

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RANDLE GRIFFIN,

Plaintiff,

HONORABLE JOHN CORBETT O'MEARA

v.

No. 11-14876

LOUIS CONDON, et al.,

Defendants.

JURY TRIAL - VOLUME 3

Thursday, January 19, 2017

Appearances:

Brandon C. Hubbard
Wade Fink
Nolan John Moody
Jessica L. Russell
Dickinson Wright, PLLC
500 Woodward Avenue, #4000
Detroit, Michigan 48226
(313) 223-3500
On behalf of Plaintiff

Clifton B. Schneider
Michigan Dept. of Att. General
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
On behalf of Defendants

- - -

To obtain a certified transcript, contact:
Sheri K. Ward, Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 219
Detroit, Michigan 48226
(313)965-4401 • ward@transcriptorders.com

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Detroit, Michigan

Thursday, January 19, 2017

9:28 a.m.

- - -

THE CLERK: The court calls the matter of
Randle Griffin v. Louis Condon, et al., Case Number 11-14876.

THE COURT: You can sit down for a minute if you want
to.

The so-called pocket brief which I was handed at the end
of the day yesterday I have read and absorbed, and I'm prepared
to grant the motion based upon what I'm told in the brief. I
think it makes clear that under the rules, the rules that apply
to a situation like this and make it relevant to a fact finder
that this kind of analysis is permitted to be given to the fact
finder.

If there's something further defendants want to say, I
would suggest that they say it in paper, and I will deal with
it, if at all, in connection with corrections or explanations
in jury instructions.

Then we have issues, which I just heard about, that's not
anybody's fault, which is based upon the fact that we -- if the
predictions are anyplace near accurate, we might be in a
position to move to conclusion in some way this morning, and
I'm wary of that and I don't want to make a decision on that
right now, and I want to hear the parties, if they have any

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1 different opinions about it, as I suspect they might. Maybe
2 their opinions are all favorable, but I'm worried about giving
3 something to the jury on Friday. I have had it happen when I
4 was practicing law, and it usually leads one to suspect that
5 the juries move faster to a conclusion than they might have
6 otherwise when looking at the end of the day and the end of a
7 period of time. I don't if it's a persuasive reason, but it's
8 a reason that I might hesitate to change the schedule in a way
9 that presented the case to the jury the first thing tomorrow
10 morning or whatever.

11 But I don't mean that I'm through thinking about it. I
12 will think about it and listen to you if there's strong
13 opinions or even weak opinions having to do with what the
14 parties would like to have happen here.

15 And we, we have, in addition to Mr. Davis, we have I take
16 it, at least as is contemplated right now, if Mr. Davis
17 testifies, it would predictably be the last plaintiff's
18 witness, although there might be rebuttal. And we have a few
19 relatively short predictably periods of testimony for
20 defendants' witnesses. And if they really go in that fast, we
21 might indeed be standing around waiting for jury instructions
22 and closing arguments this morning.

23 But, again, I would hesitate to do that and to say come on
24 in here and start deliberating tomorrow morning. That doesn't
25 feel right, and it hasn't been right in my experience.

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1 All right. I have been doing all of the talking, and if
2 somebody wants to say something, you can say it. I don't know
3 what more there is to say about what we're talking about, but
4 go ahead.

5 **MR. HUBBARD:** Nothing from the plaintiff, Your Honor.

6 **MR. SCHNEIDER:** Just for clarity of the record, Your
7 Honor, my response to the plaintiff's brief regarding the
8 admissibility of Exhibit 44, you want that in writing tonight?

9 **THE COURT:** I'm sorry?

10 **MR. SCHNEIDER:** Yes, Your Honor. My response, the
11 defense response to the plaintiff's pocket brief regarding
12 Exhibit 44, you want my response in writing filed tonight?

13 **THE COURT:** I would like a response if you have one.
14 It doesn't have to be in writing, but you might prefer it that
15 way. And what did you ask? Do I want it overnight?

16 **MR. SCHNEIDER:** Your Honor, I thought what you had
17 said is you don't want my verbal response, you want my response
18 in writing, so I suspect you would need that before we get to
19 the jury obviously.

20 **THE COURT:** Okay. If I left you with the impression
21 that I wanted something in writing, I don't "diswant." I don't
22 want to discourage you from presenting something in writing,
23 but it doesn't have to be that.

24 **MR. SCHNEIDER:** I can present my response orally
25 right now if the Court prefers.

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1 **THE COURT:** I don't know what you anticipate would be
2 the length of that argument now.

3 **MR. SCHNEIDER:** Five to ten minutes, Your Honor.
4 Closer to five.

5 **THE COURT:** Then we've got to have some time for, if
6 they want it, as far as the other side of this with
7 Mr. Hubbard.

8 Why don't we go until we have a break in the other
9 activity here this morning, on a recess, and we'll, if you
10 still want to, we'll let you argue what you want to say then
11 and the plaintiff can rebut if plaintiff has a rebuttal.

12 **MR. SCHNEIDER:** Thank you, Your Honor.

13 **MR. HUBBARD:** Thank you, Judge.

14 **THE COURT:** Oh, there is one other thing, and that is
15 there's been a request, if that's what you want to call it, by
16 the Marshals Service, the Deputy Marshals who are regularly
17 with us. We have got some other people doing the same work,
18 and we admire them for doing it. The Marshals are concerned
19 about the rules that are usually in place for non-party
20 witnesses who are incarcerated, and they want there to be
21 limits on -- it would be Mr. Davis. He's incarcerated, I'm
22 told, and they would like limits to be placed upon his mobility
23 when he's in the witness chair.

24 We haven't had a back and forth on this, and it would be a
25 mistake if I were suggesting something that would lead one to

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1 the conclusion that there has been an argument. There hasn't
2 been any argument. But there has been a conviction, a
3 conclusion, I guess, that I came to, and I think the Marshals
4 agreed to, that they would put Mr. Davis in the witness chair
5 before the jury comes in and he would be hindered in his motion
6 while he's there with shackles, which would be on his legs but
7 would not be visible. I don't know if it makes an awful lot of
8 difference. If it makes any difference, I'm inclined to agree
9 with it. If anybody wants to object, they can. If they don't
10 want to object, they can be quiet.

11 Yes.

12 **MS. RUSSELL:** Your Honor, that works well for us. We
13 would just respectfully ask that when Mr. Davis leaves jury box
14 that the jury not be present.

15 **THE COURT:** Yes. I didn't say that, but that would
16 be consistent.

17 **MS. RUSSELL:** Okay. Thank you, Your Honor.

18 **THE COURT:** All right. Do we have anything else?
19 Are we ready for the jury?

20 Bring in the jury.

21 **MR. HUBBARD:** Thank you, Judge.

22 **THE CLERK:** Judge, do you want to bring in Mr. Davis
23 first?

24 **THE COURT:** Maybe I'm confused about that. Mr. Davis
25 is being called as a witness for the plaintiff so we better

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1 bring him in. I didn't realize he was going to come right now,
2 but bring in Mr. Davis.

3 (Mr. Davis entered the courtroom.)

4 **THE COURT:** You are Mr. Davis?

5 **MR. DAVIS:** Yes, sir.

6 **THE COURT:** And do you have shackles on your feet at
7 this time?

8 **THE WITNESS:** Yes, sir.

9 **THE COURT:** All right. We're ready for the jury.
10 We'll bring in the jury.

11 We want you to stay invisible as far as what you've got on
12 your feet, which I'm not sure exactly how you do that, but
13 maybe you need to be seated, maybe you don't need to be seated,
14 but you'll know what.

15 **THE CLERK:** All rise for the jury.

16 (Jury in at 9:39 a.m.)

17 **THE COURT:** Member of the jury, please be seated. I
18 believe that some kind of an award, we don't have a monetary
19 award unfortunately for this kind of thing, is due you for
20 getting here as promptly as you did even with a lot of
21 confusion as I understand there has been on the road.
22 Thank you for being here.

23 I'll say one other thing before we go to the next witness
24 and that is that we're at the point where we're discussing
25 whether or not we should be in session tomorrow. I know you've

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1 heard from Mr. Barkholz on this, and I should tell you in
2 advance that I'm not inclined to do that for reasons that I
3 hope make sense, but whether they do or not, they make sense to
4 me. But I'm thinking about it, and if you have strong
5 opinions, you can talk to Mr. Barkholz. I'm sure you have
6 already.

7 Anyway, thank you for your patience, and we're moving the
8 case obviously or we wouldn't be talking about this, but
9 whether we move it really fast and try to take care of it
10 tomorrow or go as far as we can and then wait until Monday for
11 the conclusion, jury instructions and everything else, final
12 arguments of the parties.

13 I guess I have said what needs to be said, and we have
14 another witness called by plaintiff and you may examine.

15 **MS. RUSSELL:** Thank you, Your Honor.

16 **THE COURT:** We have not had Mr. Davis sworn yet. If
17 you would do that, please.

18 - - -

19 **TERRANCE DAVIS,**

20 being first duly sworn to tell the truth,
21 was examined and testified upon his oath
22 as follows:

23 **THE COURT:** Is that a yes?

24 **THE WITNESS:** Yes, sir.

25 **THE COURT:** Okay. Go ahead.

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1

- - -

2

(9:42 a.m.)

3

DIRECT EXAMINATION

4

BY MS. RUSSELL:

5

Q. Good morning, Mr. Davis.

6

A. Good morning.

7

Q. How are you today?

8

A. I'm all right.

9

Q. I'm going to start off with some basic questions. So

10 where do you currently reside?

11

A. Where do I currently?

12

Q. Where do you currently live?

13

A. Jackson.

14

Q. And do you live in a correctional facility?

15

A. Yes, ma'am. Cotton Correctional Facility.

16

THE COURT: I don't -- I'm here equipped with --

17

MS. RUSSELL: I'll speak louder, Your Honor.

18

THE COURT: -- really world-famous hearing aids and

19

I'm still not getting it. I don't think the microphone is --

20

I'm hearing Mr. Davis, but I haven't had much challenge on

21

that. If you can get closer to the mike, it would be helpful.

22

MS. RUSSELL: I'll speak closer to the mike,

23

Your Honor. Is that better?

24

THE COURT: Yes, it is.

25

MS. RUSSELL: Okay. Thank you.

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1 **BY MS. RUSSELL:**

2 **Q.** So you currently reside at a correctional facility?

3 **A.** Yes, ma'am.

4 **Q.** And how many years have you been incarcerated?

5 **A.** Ten years.

6 **Q.** And in that ten years have you been incarcerated at
7 multiple facilities?

8 **A.** Yes, ma'am.

9 **Q.** Approximately how many facilities?

10 **A.** Seven.

11 **Q.** Seven. At any time were you incarcerated at Gus Harrison
12 Correctional Facility?

13 **A.** Yes.

14 **Q.** And when you were at Gus Harrison Correctional Facility,
15 were you housed in Housing Unit 2?

16 **A.** Yes, ma'am.

17 **Q.** When you were at Gus Harrison Correctional Facility, did
18 you know Defendants Condon, McMurtrie and Downard, who are
19 seated over here?

20 **A.** Yeah. I knew them as regular unit officers.

21 **Q.** Okay. So they worked in your unit?

22 **A.** Yes, ma'am.

23 **Q.** And while you were at Gus Harrison, did you also know
24 Plaintiff Randle Griffin?

25 **A.** Yes.

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1 Q. At what time period were you at Gus Harrison, to your
2 recollection?

3 A. I want to say like -- I know 2010 to like 2011. I wasn't
4 there that long.

5 Q. Okay. Were you there from January to March 2011?

6 A. Yes, ma'am.

7 Q. What was your experience like at Gus Harrison compared to
8 other facilities that you were previously incarcerated or now
9 currently incarcerated in?

10 MR. SCHNEIDER: Object to lack of relevance.

11 MS. RUSSELL: Your Honor, this goes directly to the
12 facility's culture.

13 THE COURT: Overruled.

14 BY MS. RUSSELL:

15 Q. What was your experience like at Gus Harrison?

16 A. Well, do you mean like how was it?

17 Q. Compared to other facilities that you'd been in.

18 A. I would rather be at other facilities than be there.

19 Q. You would rather be at other facilities?

20 A. Yes, ma'am.

21 Q. Is there a particular reason why?

22 A. Just the atmosphere, it was, it was foul how officers
23 treated, you know what I'm saying, us inmates.

24 Q. Do you have any examples of how they treated inmates that
25 might have differentiated from other facilities?

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1 **MR. SCHNEIDER:** Objection, relevance, Rule 404 and
2 Rule 403.

3 **THE COURT:** Overruled for purposes of answering that
4 question or having it answered. I'm not sure how far I want
5 you to go with this though.

6 **MS. RUSSELL:** I understand, Your Honor. That was my
7 last question.

8 **THE WITNESS:** Could you repeat your question, please?

9 **BY MS. RUSSELL:**

10 **Q.** I said, could you provide some examples as to how the
11 facility was problematic for you?

12 **A.** I didn't like myself how the officers, you know what I'm
13 saying, treated us, how they would talk to us in any type of
14 way.

15 **Q.** Okay. When you were at Gus Harrison, did you notice a
16 discrepancy as to the number of tickets that were issued to
17 prisoners compared to a different facility?

18 **A.** They wrote a gang of tickets for any and everything.
19 Minute stuff you received a ticket.

20 **Q.** Was that unusual compared to other facilities?

21 **A.** Yeah, because anywhere else where I may have been, like
22 say if I was at Carson City Correctional Facility and I left a
23 book on my bed or whatever or my bed wasn't made, the CO
24 wouldn't -- you know what I'm saying, they may tell me, "Man,
25 your bed is supposed to be made at eight o'clock, could you go

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1 make your bed." But there at Gus Harrison you are going to
2 receive a misconduct ticket.

3 Q. I'm going to move into the specifics now. Do you remember
4 any events that occurred on March 2nd, 2011?

5 A. Yeah.

6 Q. And what happened that day to your recollection?

7 A. On that day I was coming in from the yard and I was
8 walking, as I was walking past the officers' desk, the
9 counselor was coming out of his office and he was frustrated,
10 you know.

11 Q. Who was the counselor?

12 A. It was RUM Condon.

13 Q. Is that the defendant seated over here?

14 A. Yes, ma'am. He came out of his office --

15 THE COURT: It was one of the defendants. If it is
16 one, would you point out who? Which one?

17 THE WITNESS: Uhm, I don't really remember which one,
18 sir.

19 THE COURT: You don't know. All right. If it's
20 important, we'll ask again.

21 BY MS. RUSSELL:

22 Q. So you don't remember specifics. You recognize the
23 three individuals here?

24 A. I recognize the three faces, but I never really dealt with
25 them on a day-to-day basis other than me having been housed in

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1 the unit with them.

2 Q. Okay. But you do recognize the three defendants seated
3 over here, you just don't necessarily know which face goes to
4 which name?

5 A. Right.

6 Q. Okay. And one of the defendants seated over here or to
7 your recollection somebody named Officer Condon was angry and
8 he walked out of his office?

9 A. Yeah, he was upset about whatever, whatever he said
10 Griffin was doing as far as trying to change how they ran the
11 unit.

12 You know, I was trying to hear what they was saying
13 because I heard a guy's name, you know what I'm saying, who I
14 know, but I wasn't trying to let them know that I was paying
15 attention to what they was saying so I was trying not to look
16 directly at them.

17 And as I was walked past, he was telling them, you know
18 what I'm saying, he was just tired of this guy trying to change
19 how they run things, you know what I'm saying, in his unit.

20 The officer told him, "Well, you know, I can solve that,
21 you know, as far as just write him some tickets, you know what
22 I'm saying, get him kicked off the warden's forum, you know,
23 and do what you've got to do."

24 They started laughing and --

25 **THE COURT:** I think the witness is in need of a

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1 question or two rather than just rambling on.

2 **MS. RUSSELL:** Okay, Your Honor. I apologize.

3 **BY MS. RUSSELL:**

4 **Q.** So to your recollection Officer Condon walked out of his
5 office and seemed upset, correct?

6 **A.** Yes.

7 **Q.** And after he walked out of his office he walked up to
8 two other individuals?

9 **A.** Yes.

10 **Q.** And when he spoke to those two individuals, he expressed
11 his frustration?

12 **A.** Yes, ma'am.

13 **Q.** And after expressing that frustration, the other
14 two defendants indicated that they had a solution, right?

15 **A.** Yes, ma'am.

16 **Q.** And that solution was writing misconduct tickets that were
17 false against Mr. Griffin?

18 **A.** Yes, ma'am.

19 **Q.** After you heard that conversation, did you inform
20 Mr. Griffin?

21 **A.** Yes. We had lockdown for count, you know what I'm saying,
22 after the yard was closed. We all came in the unit. So when
23 it was cleared, I immediately, you know what I'm saying, told
24 him what I overheard, you know what I'm saying.

25 **MS. RUSSELL:** Okay. No further questions at this

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1 time, Your Honor.

2 **THE COURT:** Very well. Thank you.

3 For the defendants, Mr. Schneider.

4 - - -

5 (9:49 a.m.)

6 **CROSS-EXAMINATION**

7 **BY MR. SCHNEIDER:**

8 **Q.** Good morning, Mr. Davis.

9 **A.** Good morning.

10 **Q.** You know who Randle Griffin is, correct?

11 **A.** Yes.

12 **Q.** You are friends with him, right?

13 **A.** Yes.

14 **Q.** Can you identify any of these people over here at the
15 table?

16 **A.** I can't remember exactly which one is which, but I know, I
17 think this is Downard, the CO.

18 **Q.** Which one are you identifying?

19 **A.** This guy right here with -- right here in front of me.

20 **THE COURT:** Which guy, on the right side?

21 **THE WITNESS:** To my left.

22 **MR. SCHNEIDER:** Okay.

23 **THE COURT:** To your left. I just want to be sure we
24 know who he is identifying, and I think it was the person on
25 the right of the table here.

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1 **THE WITNESS:** Yes, sir.

2 **THE COURT:** If I'm wrong, it should be corrected. Is
3 that correct?

4 **THE WITNESS:** Yes.

5 **THE COURT:** Is that your understanding, too?

6 **MR. SCHNEIDER:** That was my understanding,
7 Your Honor, but then I think it changed to the person on the
8 left so I'm not sure at this point.

9 **THE COURT:** Oh, well, whoever, let's get the record
10 reflecting.

11 **THE WITNESS:** My left, your right.

12 **MS. RUSSELL:** Objection, Your Honor. Perhaps we
13 could change the line of questioning so it's more clear who
14 Mr. Davis is identifying.

15 **MR. SCHNEIDER:** I think I'm going to move on,
16 Your Honor, at this point so ...

17 **THE COURT:** All right. On redirect you can get some
18 more information if you want it.

19 **MS. RUSSELL:** Yes, Your Honor.

20 **BY MR. SCHNEIDER:**

21 **Q.** All right. Mr. Davis, you are currently serving on
22 second-degree murder?

23 **MS. RUSSELL:** Objection, Your Honor. We already
24 discussed this, and defense counsel knows that this is not
25 relevant.

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1 **MR. SCHNEIDER:** Rule 609, Your Honor. The evidence
2 comes in.

3 **THE COURT:** I don't understand how you fit this in
4 the socket that goes relevant. I don't get it. If you want to
5 explain it, you can.

6 **MR. SCHNEIDER:** Thank you, Your Honor. Federal Rules
7 of Evidence --

8 **MS. RUSSELL:** Your Honor, you already ruled on this
9 yesterday. I don't know how many more times this is going to
10 be brought up, but it's completely irrelevant.

11 **THE COURT:** If this is something that I have ruled on
12 and we are now getting the Federal Rules of Civil Procedure
13 out, it better be something I haven't ruled on or there is
14 going to be a response from me if I've ruled on it already.

15 **MR. SCHNEIDER:** This is different, Your Honor. Under
16 Rule 609 evidence of a criminal conviction must be admitted
17 subject to 403. You had a 403 ruling yesterday as to a
18 different witness. This is a different crime, different
19 analysis under 403.

20 **THE COURT:** Despite 403, I'm still not clear on how
21 this is relevant.

22 **MR. SCHNEIDER:** Your Honor, since Rule 609 says that
23 a witness -- specifically says, "A witness may be impeached by
24 evidence of a criminal conviction. The evidence must be
25 admitted subject to Rule 403." No discretion unless 403 keeps

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1 it out, Your Honor.

2 **MS. RUSSELL:** Your Honor, it has no bearing on his
3 credibility for truthfulness, and under Sixth Circuit law it
4 does not come in in this particular circumstance.

5 **THE COURT:** I'm not, I'm not sure that it is relevant
6 to impeachment. However, I take it the question has been
7 asked. Implicitly the silence probably answers it. If you
8 have an answer to the question, which I guess, Mr. Schneider,
9 was weren't you convicted of something.

10 **MR. SCHNEIDER:** Correct, Your Honor. Do you want me
11 to repeat the question or no?

12 **THE COURT:** Well, I just want it to be clear.

13 **MR. SCHNEIDER:** That was the question. You are in
14 prison for and then the name of his conviction.

15 **THE COURT:** And if you've got an answer to the
16 question or if you need to hear it again, please say so.

17 **THE WITNESS:** Yes, that's what I'm incarcerated for.

18 **BY MR. SCHNEIDER:**

19 **Q.** Okay. When you were walking past the desk and you heard
20 this alleged conversation, where were you coming from?

21 **A.** Yard. Coming from outside.

22 **Q.** Yard is just where you are allowed to go outside and do
23 whatever is out there?

24 **A.** Yes, sir.

25 **Q.** What time was this?

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1 **A.** Like around, like in between like 3:45, 3:50, somewhere in
2 there.

3 || Q. In the afternoon?

4 | **A.** Yes, sir.

5 **MR. SCHNEIDER:** I don't have any further questions.
6 Thank you.

7 **THE COURT:** Any redirect from the plaintiff?

8 || - - -

9 (9:54 a.m.)

10 REDIRECT EXAMINATION

11 BY MS. RUSSELL:

12 || Q. Hi, Terrance.

13 **A.** Hello.

14 Q. Just to assist the jury, you pointed out Officer Downard
15 previously and you said the individual right in front of me and
16 you said the left, your left initially.

17 **A.** My left, your right.

18 Q. So on my right -- well, if I was standing behind them --
19 my right, your left is Officer Downard, correct?

20 **A.** Yes, ma'am.

21 **THE COURT:** To make sure that -- maybe it's difficult
22 for me for some reason to understand, but which person sitting
23 at the table is that?

24 He just raised his hand, and I think we now know who has
25 been identified and the record is clear on that.

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1 **MS. RUSSELL:** Thank you, Your Honor.

2 **BY MS. RUSSELL:**

3 **Q.** Mr. Davis, do you recall authoring an affidavit on or
4 around the day of the events that you've testified to?

5 **A.** Yes.

6 **Q.** And if you looked at that affidavit, would that -- you
7 know, that is an accurate reflection of what happened that day,
8 correct?

9 **A.** Yes, ma'am.

10 **MS. RUSSELL:** Your Honor, may I approach the witness?

11 **THE COURT:** You may.

12 **BY MS. RUSSELL:**

13 **Q.** Mr. Davis, do you recognize this document?

14 **A.** Yes, ma'am.

15 **Q.** It's the affidavit that you completed and signed on
16 March 2nd, 2011?

17 **A.** Yes.

18 **Q.** And on this you stated, "I, Terrence Davis, swear under
19 the penalty of perjury that on March 2nd, 2011 --

20 **THE COURT:** Is this going to be admitted or --

21 **MS. RUSSELL:** I was going to provide a prior
22 consistent statement.

23 **THE COURT:** Excuse me?

24 **MS. RUSSELL:** I'm providing a prior consistent
25 statement to bolster the witness's testimony, but I can move

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1 this into evidence if you'd like.

2 **THE COURT:** It doesn't have to be admitted,
3 especially if it's submitted to the witness for the purpose of
4 refreshing memory, but you should say that if that's what it
5 is, and you've got Mr. Schneider on his feet.

6 **MR. SCHNEIDER:** Objection, Your Honor. You're not
7 allowed to use a prior consistent statement until there has
8 been some impeachment with a prior inconsistent statement. I
9 also object to the affidavit as hearsay.

10 **THE COURT:** All right. On the basis that the Court
11 has permitted it for the reasons stated, you can go ahead.

12 **MS. RUSSELL:** I can go ahead and read it, Your Honor?

13 **THE COURT:** Yes.

14 **BY MS. RUSSELL:**

15 **Q.** You stated:

16 "I, Terrance Davis, swear under penalty of perjury
17 that on March 2nd, 2011 as I was walking past the
18 officers' station into Housing Unit 2 I heard RUM
19 Condon, RUO McMurtrie and RUO Downard state that they
20 were tired of Griffin trying to change the way that
21 they run the unit. RUO Downard stated to RUO
22 McMurtrie and RUM Condon that he knew how to get rid
23 of Griffin. He said that he would write him a ticket
24 to get him removed from the warden's forum. They all
25 agreed and started laughing out loud as if this was

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1 funny. After four o'clock count, I immediately
2 informed the block representative Griffin, ID Number
3 196968, about what I heard. If called as a witness,
4 I'm willing to testify as to the facts contained in
5 this declaration."

6 Is that correct?

7 **A.** Yes, ma'am.

8 **Q.** And at the time that you completed this affidavit you knew
9 what the defendants looked like and you were very familiar with
10 them, weren't you?

11 **A.** Somewhat, like I said, from being in the unit with them,
12 yes.

13 **Q.** Because you completed this affidavit on the very day of
14 the alleged incident, correct?

15 **A.** Yes.

16 **MS. RUSSELL:** Thank you.

17 **MR. SCHNEIDER:** No further questions, Your Honor.

18 **THE COURT:** All right. You are going to be excused
19 as soon as we get the jury out of here, but we want to ask a
20 couple more questions.

21 You will please go to the jury room. You won't be there
22 long. Thank you for your patience.

23 (Jury out at 9:59 a.m.)

24 **THE COURT:** Unless anybody objects or has a different
25 idea, now would be the time Mr. Davis can go back to lockup and

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1 stand up despite the fact you've got your shackles on. Anybody
2 have any problem with that?

3 **MR. SCHNEIDER:** No.

4 **MS. RUSSELL:** No.

5 **THE COURT:** Okay. Thank you. You are excused.

6 **THE WITNESS:** Thank you.

7 **THE COURT:** And what does the plaintiff have in the
8 way of a next witness?

9 **MS. RUSSELL:** No further witnesses, Your Honor. We
10 rest.

11 **THE COURT:** I take it what you're telling me is that
12 that's the plaintiff's case in chief?

13 **MS. RUSSELL:** Yes, we rest our case in chief,
14 Your Honor.

15 **THE COURT:** Thank you. And we're ready then for
16 defendant. If you are ready to call a witness, you can do it.
17 If this is the time you would like a break for five or ten
18 minutes, we can do that, too.

19 **MR. SCHNEIDER:** Your Honor, I'm ready to move for a
20 judgment as a matter of law and a directed verdict.

21 **THE COURT:** All right. You are ready to make such a
22 motion, and I'm sure you are ready for my response, which is
23 going to be not favorable to your motion at least now. The
24 motion, of course, can be renewed as you move through this
25 trial. Do you have something to say that you want to use to

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1 bolster that motion?

2 **MR. SCHNEIDER:** Sure. I can put my motion on the
3 record, Your Honor. Is that what you're asking me to do?

4 **THE COURT:** Yeah, I'm asking you if you have
5 something to say.

6 **MR. SCHNEIDER:** Yes, I do, Your Honor. I don't want
7 to waive that so I'll put it on the record.

8 The defendants want to move for judgment as a matter of
9 law. The plaintiff hasn't presented any evidence of protected
10 conduct. We have Exhibit 43 showing that he just dropped in.
11 These were the notes from the ombudsman that state that
12 Mr. Griffin just dropped in on an interview with another
13 prisoner. That's not protected conduct under clearly
14 established law back in 2011. For that reason the defendants
15 are entitled to qualified immunity.

16 As to adverse action, Your Honor, the plaintiff has
17 alleged one minor ticket in which he was found guilty. I
18 believe he was "fact bound" by that ticket and "checkmated"
19 under the Checkmate Rule from testing that ticket.

20 The law also states that minor tickets are not adverse
21 action. There was no clearly established law in 2011 stating
22 that it was. For that reason the defendants are entitled to
23 qualified immunity.

24 As for the second ticket, again, it was a minor ticket and
25 it was torn up the next day. That clearly is not adverse

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1 action under any clearly established law. The same is true
2 with threats, not an adverse action.

3 The defendants are entitled to qualified immunity for
4 those reasons. I understand that the Sixth Circuit, in
5 reversing this Court's prior dismissal of this case the Sixth
6 Circuit said, well, a ticket can be an adverse action. The
7 defendants were found by the record at the time, which was
8 undeveloped prediscovery, the plaintiff claimed this was a
9 major misconduct ticket, and the Sixth Circuit for that reason
10 said, yeah, a major ticket can be an adverse action, send it
11 back to discovery.

12 Well, we now know and have evidence that these are minor
13 tickets, Your Honor, Class 2 tickets, and there is clearly
14 established law that a Class 2 ticket is not an adverse action.
15 That's just the way it is, and the defendants are entitled to
16 qualified immunity as a result.

17 As to causation, the plaintiff has presented no evidence
18 that the defendants were aware of this contact with the
19 ombudsman. There's absolutely zero evidence of that in this
20 case. The whole causation aspect, that they retaliated against
21 him because of his contact with the ombudsman, fails because he
22 can't show any causation. He had the burden of proof and did
23 not present that evidence.

24 We also have the forum removal. We have Exhibits A, C, D
25 and F. C and D have been excluded thus far. I'll be asking

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1 the Court to reconsider that for another reason as to another
2 witness, but as for right now, the Court at least can look at
3 those exhibits. A and F are in evidence. Those, along with C
4 and D, show that the defendants had nothing to do with removal
5 from the forum. The plaintiff was being investigated back in
6 February and was removed for another reason. It had nothing to
7 do with these defendants. All four of those exhibits clearly
8 show that.

9 As far as loss of the job, the defendants have no power to
10 remove the plaintiff from his job. He was removed because he
11 was found guilty on a ticket. He had a hearing on that ticket.

12 And for all of those reasons the defendants are entitled
13 to qualified immunity. Alternatively, for the same reasons
14 essentially, the defendants request a directed verdict in their
15 favor. Thank you, Your Honor.

16 **THE COURT:** Thank you. If the plaintiff has a
17 response, the plaintiff can make the response, but briefly
18 because I'm going to deny the motion.

19 **MR. FINK:** Okay. Thank you, Your Honor. I'll be
20 very brief in that case, and thank you, Your Honor.

21 The three elements here to prove a First Amendment
22 retaliation claim are protected conduct, adverse action, and
23 causation. The facts that we proposed to show in our response
24 to their summary judgment motion, which was denied by this
25 Court, we have indeed shown a reasonable juror could conclude

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1 and believe Randle Griffin, could believe our two witnesses
2 that witnessed the defendants conspiring to write these
3 tickets, can believe Randle Griffin that the conversation with
4 Defendant Condon was indeed about talking to the ombudsman.

5 The ombudsman herself said that it is very likely that
6 guards know when she is in the building. It's also the
7 testimony of Randle Griffin that she met in the office right
8 next to Defendant Condon.

9 So the main defense here, that we haven't proven that they
10 knew the ombudsman was there, there is a lot of evidence on
11 which a reasonable juror could conclude that indeed the
12 defendants did know and indeed that the defendants did
13 retaliate against plaintiff.

14 As for the two -- this is the last thing I'll say, Your
15 Honor. As to the two damages categories, the warden's forum,
16 plaintiff was removed eight days after he got the ticket and at
17 no time before was any of these reasons for excluding him ever
18 mentioned.

19 The job, defendants knew, defendants knew he would lose
20 his job if he received a ticket. That was the whole point of
21 giving the ticket, and that's something a reasonable juror
22 could conclude.

23 For those reasons, Your Honor, the JNOV motion and
24 qualified immunity motion should be denied. Thank you.

25 **THE COURT:** Very well. The motion for defendants is

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1 denied, as the Court explained it would be, and it may be
2 renewed, of course, as we move along in this case.

3 Are you ready to put the defendants' case in?

4 **MR. SCHNEIDER:** I am, Your Honor.

5 **THE COURT:** Any reason defendant should not call
6 witnesses now? Because he's going to do it, but it doesn't
7 have to be right now. It can be delayed a little, like
8 five minutes.

9 **MR. SCHNEIDER:** Your Honor, I could use a restroom
10 break. Is that what the Court is getting at?

11 **THE COURT:** I'm sorry?

12 **MR. FINK:** Whatever Your Honor prefers, we are ready
13 to go.

14 **MR. SCHNEIDER:** Exactly.

15 **MR. FINK:** But we're happy to take a break.

16 **THE COURT:** We have had the jury out for maybe ten
17 minutes, and we could give them another five or ten minutes.

18 **MR. FINK:** Absolutely, Your Honor.

19 **THE COURT:** The Court is in recess.

20 **MR. FINK:** Thank you, Your Honor.

21 **MR. SCHNEIDER:** Thank you.

22 (Recess from 10:07 a.m. to 10:13 a.m.)

23 **THE COURT:** Okay. Are these witnesses any witnesses
24 that will need special identification and security or are
25 they -- we have got our defendants and one other person, I

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1 guess, have we not?

2 **MR. SCHNEIDER:** He's not a prisoner, Your Honor.

3 **THE COURT:** Okay. The answer is no. Let's bring in
4 the jury.

5 **THE CLERK:** All rise for the jury.

6 (Jury in at 10:14 a.m.)

7 **THE COURT:** Please be seated. Thank you for your
8 patience. We have now heard the plaintiff's case in chief,
9 which means plaintiff is probably pretty much through with what
10 they want to present to the jury, maybe altogether through
11 depending upon what happens, they might have rebuttal
12 witnesses, too, but we will now hear from the defendants, their
13 side of the case.

14 And, Mr. Schneider, you may call your first witness.

15 **MR. SCHNEIDER:** Thank you, Your Honor. The defense
16 calls Brian Evers.

17 **THE COURT:** Please come forward and take the oath
18 from the court reporter.

19 - - -

20 **BRIAN EVERS,**

21 being first duly sworn to tell the truth, was
22 examined and testified upon his oath
23 as follows:

24 **THE COURT:** Thank you. Welcome.

25 - - -

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(10:15 a.m.)

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. Good morning.

A. Good morning.

Q. Will you state your name for the record, please.

A. Brian Evers.

Q. Where are you currently employed, Mr. Evers?

A. Gus Harrison Correctional Facility.

Q. All right. How long have you been there?

A. Twenty-four years.

Q. What's your position at the prison?

A. I'm a Resident Unit Manager.

THE COURT: I would appreciate it if both of you
would be a little closer to the microphones --

THE WITNESS: Is that better?

THE COURT: -- if you can do that.

Go ahead.

BY MR. SCHNEIDER:

Q. Okay. And in 2011 which prison did you work at?

A. Gus Harrison.

Q. All right. What is your position there?

A. Resident Unit Manager.

Q. And back in 2011?

A. Resident Unit Manager.

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1 Q. All right. There's a small exhibit book in front of you
2 there. Would you grab that. Would you flip to Exhibit E,
3 please. Let me know when you're there.

4 A. I'm there.

5 Q. Okay. The second page of Exhibit E, do you see that?

6 A. Yes.

7 Q. Okay. What is that document?

8 A. It's a hearing report for a Class 2 misconduct.

9 Q. We're going to need you to speak up so that everybody can
10 hear you.

11 A. It's a hearing report for a Class 2 misconduct.

12 Q. All right. And who is the prisoner who got the ticket?

13 A. Griffin.

14 Q. Okay. And who heard him on the ticket?

15 A. I did.

16 Q. Okay. So it was your job to decide whether he was guilty
17 or not of that ticket?

18 A. Yes.

19 Q. All right.

20 Okay. Can you see on the screen the ticket?

21 A. Yes.

22 Q. Okay. That's the same as Exhibit E that you just
23 identified?

24 A. Correct.

25 Q. Okay. And this is the hearing report portion of the

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1 ticket, correct?

2 **A.** Correct.

3 **Q.** Okay. Up here in evidence, this is a section --

4 **MR. HUBBARD:** Your Honor, just a brief objection.

5 Counsel just said, "Up here in evidence." This document is not
6 in evidence.

7 **THE COURT:** All right. It's been noted.

8 Go ahead.

9 **MR. SCHNEIDER:** Your Honor, the exhibit was admitted
10 into evidence yesterday.

11 **THE COURT:** All right. I didn't make any official or
12 significant move as a result of the objection, and you can go
13 ahead.

14 **MR. SCHNEIDER:** Thank you, Your Honor.

15 **BY MR. SCHNEIDER:**

16 **Q.** Up here in the box it says, "Evidence and/or prisoner
17 statement." Do you see that?

18 **A.** Yes.

19 **Q.** Okay. This is what the prisoner's statement to you was at
20 the hearing, correct?

21 **A.** Correct.

22 **Q.** All right. And right here he says that he checked into
23 the unit when he got back to the unit.

24 **A.** That's what he stated, yes.

25 **Q.** That's what he told you, correct?

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1 || **A.** Yes.

2 Q. All right. "Reason for findings." These are your
3 findings?

4 | **A.** Yes.

5 Q. Okay. You delayed the hearing so you could check the
6 camera?

7 **A.** Yes.

8 Q. Did the camera show him going to work at any time that
9 day?

10	A.	No.
----	-----------	-----

11 Q. You understand his defense was he had a conflicting
12 warden's forum call-out, correct?

13 || **A.** Correct.

14 Q. If that was true and he was late to work because of that,
15 what would you have done with this ticket?

16 **A.** If he showed up, I would have dismissed it.

17 Q. You would have dismissed the ticket?

18 || **A.** Correct.

19 **MR. SCHNEIDER:** Okay. No further questions.

20 THE COURT: Cross-examination.

21

22 (10:19 a.m.)

23 CROSS-EXAMINATION

24 BY MR. HUBBARD:

25 Q. Good morning, sir.

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1 **A.** Good morning.

2 **Q.** My name is Brandon Hubbard, and I represent Mr. Griffin
3 along with my team behind me.

4 You testified about watching a camera.

5 **A.** Yes. I had the camera checked, yes.

6 **Q.** How long was the video?

7 **A.** He said he arrived --

8 **Q.** No, no. Excuse me, sir. My question to you was how long
9 was the video?

10 **A.** When you review a video, you can review any time slot you
11 want. I reviewed over half an hour of the video, 15 minutes
12 prior and 15 minutes after. I had the video checked.

13 **Q.** When you say you had the video checked, what do you mean?

14 **A.** The hearings investigator is the one that actually does
15 the reviewing of the video. I provide an OTIS face sheet of
16 the prisoner, and there's only a couple of people that are
17 allowed to operate the cameras on the old camera system so I
18 have to go through the hearings investigator.

19 **Q.** Is that to maintain the integrity of the videos?

20 **A.** Correct.

21 **Q.** I just want to be clear. You personally watched the
22 video?

23 **A.** No, the hearings investigator. I had the video checked.
24 That's what I said.

25 **Q.** Well, I -- just so we're clear, my question to you was how

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1 long was the video that you watched, and you said 15 minutes
2 before and 15 minutes after. But, to be clear, you never
3 actually looked at the video, did you?

4 **A.** Correct.

5 **Q.** You delegated that out to somebody on your staff?

6 **A.** She doesn't work for me, no. She's a hearings
7 investigator. She's an impartial person for the Department and
8 population. That's her assignment.

9 **Q.** When you say the Department, you mean the Department of
10 Corrections?

11 **A.** She's employed by the Department of Corrections, yes.

12 **Q.** Are you aware that my client's -- actually my firm on
13 behalf of my client served the MDOC with a subpoena nearly
14 two years ago?

15 **A.** I don't know anything about this case.

16 **Q.** Fair enough. In that subpoena we requested surveillance
17 camera footage from Housing Unit 2 at the Gus Harrison facility
18 for March 1st, 2nd, 3rd, 4th and 5th. Do you have any reason
19 to dispute that?

20 **A.** No, but there's a retention schedule. If you just
21 requested it two years ago from something in 2011, it wouldn't
22 have been retained unless there's a critical incident.

23 **Q.** Are you aware of how long this litigation has been
24 pending?

25 **A.** No.

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1 Q. Would it surprise you to learn that my client filed this
2 lawsuit within that two-year window?

3 A. Okay.

4 Q. And are you aware that, that notwithstanding, in response
5 to the subpoena we didn't receive any video footage?

6 A. Like I said, the video would not have been maintained that
7 long on the retention schedule. The video is only maintained
8 for -- if there's a critical incident. Otherwise, it's like on
9 a 30-day time lapse. It expires if you don't pull it within
10 30 days.

11 Q. So from your perspective there's a video out there that we
12 requested, we didn't receive any response to our subpoena, and
13 it's a video that you never personally reviewed, correct?

14 A. No, there's not a video out there that was available when
15 you asked.

16 Q. Fair enough.

17 MR. HUBBARD: Permission to approach the witness,
18 Your Honor.

19 THE COURT: You may.

20 BY MR. HUBBARD:

21 Q. Sir, I have handed to you a document that's been already
22 admitted into evidence. It's Exhibit Number 44 from the
23 plaintiff, and I'll just cut right to the chase. It's a
24 document that details a systemic problem at Gus Harrison
25 facility regarding the writing of false misconduct tickets.

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1 Did you ever see that report?

2 **A.** No, no.

3 **Q.** Have you ever heard anything about Gus Harrison facility
4 writing false misconduct tickets?

5 **A.** Officially, no. I mean prisoners make statements all the
6 time.

7 **Q.** So there's a report out there, the report that's in your
8 hands, that's dated March of '11, excuse me, February of '11,
9 and --

10 You've been at Gus Harrison for how long?

11 **A.** Almost 24 years.

12 **Q.** You've been at Gus Harrison for 24 years, which
13 encompasses the year 2011, and then there's a report from the
14 ombudsman's office regarding a systemic problem at Gus Harrison
15 facility regarding the writing of false misconduct tickets and
16 you're not aware of any of that activity?

17 **A.** These are just accusations. There's no evidence that it
18 happened.

19 **Q.** Answer my question, please.

20 **A.** No, I'm not aware of it so I'm trying to read it while you
21 are talking.

22 **Q.** Take your time.

23 **A.** I'm not listed anywhere in here. I don't know why I would
24 be aware of it.

25 **Q.** You are not aware at all of the systemic problem at Gus

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1 Harrison --

2 **A.** I'm not aware of this report.

3 **Q.** Let me finish my question, sir. Are you aware of the
4 systemic problem at Gus Harrison -- let me finish my question.

5 Are you aware of the systemic problem at Gus Harrison
6 facility regarding the writing of false misconduct tickets?

7 **A.** For a second time, no.

8 **MR. HUBBARD:** No further questions, Your Honor.

9 **THE COURT:** Mr. Schneider, do you have something?

10 **MR. SCHNEIDER:** No questions, Your Honor.

11 **THE COURT:** Then you are excused. Thank you.

12 **THE WITNESS:** Thank you.

13 **MR. SCHNEIDER:** Your Honor, the defense calls
14 Gary McMurtrie.

15 **THE COURT:** Please take the oath before you are
16 seated. Thank you.

17 - - -

18 **GARY MCMURTRIE,**

19 being first duly sworn by the Court to tell
20 the truth, was examined and testified upon his
21 oath as follows:

22 - - -

23

24

25

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(10:27 a.m.)

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. All right. Could we get your name for the record, please.

A. Gary McMurtrie.

Q. Okay. And you have heard the other witnesses. You know you need to keep your voice up, right?

A. Yes, sir.

Q. Okay. Where are you currently employed, Mr. McMurtrie?

A. Gus Harrison.

Q. I'm sorry?

A. Gus Harrison Correctional Facility.

Q. All right. What's your position there?

A. I'm a corrections officer.

Q. You have also served as a union steward?

A. Yes, for about a year.

Q. How long have you been employed there?

A. About 15 years, just a little less.

Q. When you hired in with the department, did you have to go to the corrections academy?

A. Yes.

Q. How long did that last?

A. I want to say I was there for eight weeks, then I was at the facility for four weeks, and then you go back to the academy for two weeks. It's different now though.

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1 Q. Okay. And since then you have also had annual training?

2 A. Yes.

3 Q. All right. Basically all, all aspects of offender
4 management?

5 A. Yes.

6 Q. You were in the military before prison?

7 A. Yes.

8 Q. Which branch?

9 A. U.S. Army.

10 Q. What are the duties of a corrections officer in the
11 prison?

12 A. Our main, our main -- well, there's corrections officers
13 and then there's -- we're all corrections officers now, but I'm
14 a housing officer. I have always been a housing officer.

15 In housing our duties are to maintain order in the housing
16 unit, safety and security of the physical plant, prisoners from
17 each other, our safety and security.

18 Q. Okay. When a person from the outside comes into prison
19 for some sort of visit, do you have any involvement with that
20 process?

21 A. No.

22 Q. You know the other defendants here, correct?

23 A. Yes.

24 Q. All right. Do you still work with them?

25 A. I work with Downard once in a blue moon. I haven't

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1 seen -- before we started dealing with this, I hadn't seen
2 Condon in years.

3 Q. Okay. When did you meet Officer Downard?

4 A. It was in 2011 when he came from the south side over to
5 the north side to 2 block.

6 Q. You were working in Housing Unit 2 already?

7 A. Yes.

8 Q. And that's what you mean when you say 2 block?

9 A. Yes.

10 Q. And then in 2011 Officer Downard came over?

11 A. Yes.

12 Q. And that's when you met him?

13 A. Yes.

14 Q. Do you guys hang out outside of work?

15 A. We have been together once outside of work. He welded a
16 patch on my muffler on my truck.

17 Q. All right. When is the last time you two worked together
18 on a regular basis in the same housing unit?

19 A. 2 block back in 2011.

20 Q. So since 2011?

21 A. I don't think we have worked together in the same housing
22 unit since then. I work on the south side now, which has
23 adjoining units, and sometimes he was in the other unit, but
24 they are separate.

25 Q. Okay. I want to talk about the process of writing a

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1 ticket in the prison. So, step one, you have to see something
2 happen, right?

3 A. Yes.

4 Q. Okay. And then you write a ticket?

5 A. Yes.

6 Q. Okay. Do you have any involvement with it after that?

7 A. No, not unless we get a questionnaire or something from
8 the H.I., from the hearings investigator.

9 Q. All right. You don't decide if the prisoner is guilty or
10 not guilty on the ticket though?

11 A. No.

12 MR. FINK: Excuse me, Your Honor. I have let it go a
13 lot, but can we let the witness testify? I mean these are all
14 leading questions. Every single one is just telling him what
15 the answer is and right. This is cross-examination basically.

16 THE COURT: Okay. I don't find anything truly
17 difficult or offensive about what he's been doing so far, but
18 you are on direct examination of your own witness so let him
19 tell you what it is for the most part.

20 MR. SCHNEIDER: I understand, Your Honor. For
21 preliminary matters usually leading is okay.

22 BY MR. SCHNEIDER:

23 Q. For a minor misconduct ticket that's a Class 2 ticket, are
24 you required to write that immediately when you see something?

25 A. No.

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1 Q. What was your normal procedure?

2 A. We would, we would wait until the end of the day and write
3 them at the end of the day because you usually have a block of
4 time at the end of the day when there's no convict movement and
5 you've got time.

6 Q. When you talk about convict movement, you are talking
7 about them -- well, what are you talking about?

8 A. I'm talking about there's periods during the day when
9 there's no movement, count time. They are locked down in their
10 cells. Or where I work now there is no cells, but they are
11 still locked down.

12 Q. Absent a job or some other requirement, is there a certain
13 time of day when they are required to be back in the housing
14 unit for the night?

15 A. Yes. When the yard is closed, they have to be in the
16 housing unit unless they have a job somewhere else.

17 Q. Did you have porters back in the unit in 2011?

18 A. Yes.

19 Q. What were the duties of the porters?

20 A. Well, they had different duties. There were different
21 jobs, like a laundry porter or dayroom porter. You had guys
22 that cleaned the wings in the unit. You had a guy that takes
23 trash to the dumpster.

24 Q. All right. I just want to focus on the dayroom porter.

25 A. Okay.

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1 Q. What were their job duties?

2 A. Keep the dayrooms clean. There's a little area in there
3 that has a microwave and a toaster and like a small corner
4 table. They had to keep that area clean. They had to keep the
5 trash taken out to the dumpster outside the unit. And there
6 was a locked footlocker in there that was full of board games,
7 and they were responsible for that. So we would have to go and
8 unlock the footlocker for them.

9 Q. How did the prisoners know what time they had to go to
10 work?

11 A. It's on their call-out. They are issued it every day.
12 Actually they get it every night on third shift for the next
13 day.

14 Q. Were they required to check in before going to work?

15 A. Yes.

16 Q. Why?

17 A. So I know they showed up on time.

18 Q. If a prisoner has a call-out and they don't show up on
19 time, what happens in prison?

20 A. Well, first I'm going to look at it and see why he didn't
21 show up. Maybe he was at health care or a visit, something.
22 If he doesn't have a good excuse for why he didn't show up and
23 he was just a couple minutes late, I'm going to give him a
24 warning, but if he's 10, 15 minutes late, I'm going to write
25 the ticket.

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1 Q. What kind of ticket is that?

2 A. It's an "out of place." It's a Class 2 ticket. It's a
3 minor.

4 Q. All right. Back in 2011 -- well, let me start like this.
5 You are currently aware that the plaintiff is claiming
6 that Mr. Bryant assaulted Condon, correct?

7 A. I'm aware of it through this lawsuit.

8 Q. Were you aware of that allegation back in 2011?

9 A. No.

10 Q. Were you aware of any investigation into that alleged
11 incident?

12 A. No.

13 Q. Aside from your involvement in this case and the testimony
14 you have heard in the court, do you know what the ombudsman is?

15 A. Just a real general, vague notion.

16 Q. Were you ever aware that the plaintiff claimed that he
17 spoke to the ombudsman?

18 A. Just through this lawsuit.

19 Q. So back in 2011 you were not aware of that?

20 A. No.

21 Q. On March 3rd, 2011 do you recall writing a ticket for
22 Mr. Griffin?

23 A. Yes.

24 Q. What was that ticket for?

25 A. Out of place.

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1 Q. What happened?

2 A. He didn't show up for his detail.

3 Q. Did you curse at him at all?

4 A. No.

5 Q. Did you find him to find out why he wasn't there for his
6 detail?

7 A. Yeah, about -- I want to say his detail started at 2:30.
8 I don't remember if it did or not, but that seems to be what I
9 remember. Excuse me.

10 About 2:45 he hadn't shown up so I went down -- or I
11 called him out of his cell and he came up on base, and I asked
12 him why he didn't show up for his detail. And he didn't say
13 anything to me. In fact, I don't remember Griffin ever
14 speaking to me. He just stood and stared at me. And I said,
15 "Well, I'm going to write you a ticket. You're laid in.
16 Return to your cell."

17 Q. And he didn't tell you why he didn't show up for work?

18 A. No.

19 Q. Did you know why he didn't show up for work?

20 A. He was in his cell. I don't know why.

21 Q. Do you currently know why he didn't show up for work that
22 day?

23 A. I know what the claim is, but ...

24 Q. And what's that?

25 A. That he was in a warden's forum meeting.

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1 Q. He had another ticket the day before.

2 A. Oh, yeah, yeah. I was confused. Yeah. Downard wrote him
3 a ticket the day before and laid him in. I didn't know about
4 the ticket that Downard wrote so my ticket was in error.

5 Q. All right. You have heard the testimony about this
6 conversation between the three of you, you, Downard and Condon,
7 about writing false tickets, correct?

8 A. Yes.

9 Q. Did that happen?

10 A. No.

11 Q. You never had a conversation of that nature?

12 A. No.

13 Q. Did you ever have any conversation about the ombudsman
14 with Downard or Condon?

15 A. No.

16 Q. When did you become aware of the March 2nd ticket that
17 Officer Downard had written?

18 A. I wrote mine on March 3rd and submitted it that night,
19 which is what we do. When we walk out at the end of the night,
20 we drop them in the control center window.

21 The next day Griffin got called out to control center to
22 have his ticket review, which would have been the 4th. I don't
23 remember what time it was, but he got called out to the control
24 center. He went up there, and I got a call from Sergeant
25 Howard and she said that Downard had just written the same

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1 ticket a couple days before. And I said, okay, then dismiss
2 mine.

3 And then he came back to the unit and a few minutes later
4 Sergeant Howard came out to the unit, and we basically had the
5 same discussion with Griffin standing right there in front of
6 me and I told her to rip the ticket up. And she ripped it up,
7 and the end.

8 Q. Who is Sergeant Howard?

9 A. She was -- back in 2011 she would have been the yard
10 sergeant pretty much every day.

11 Q. And part of her job was to review tickets?

12 A. Yes.

13 Q. And that happens before a hearing?

14 A. Yes.

15 Q. Did you have any reason at all to be upset or mad at
16 Mr. Griffin?

17 A. No.

18 MR. SCHNEIDER: All right. No further questions.

19 THE COURT: Cross-examination.

20 MR. FINK: Yes, Your Honor. Thank you.

21 THE COURT: I'm not being critical of anybody's
22 behavior because I don't know enough about it, but there's
23 something going on immediately next to the jury box.

24 MR. FINK: Yes, Your Honor. My colleague is looking
25 for an exhibit that's already been admitted. If you prefer he

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1 didn't do that, that's fine. I asked him to do that. That's
2 my fault.

3 **THE COURT:** Well, I would prefer that he not do it
4 for a long period of time.

5 **MR. FINK:** Understood. Understood, Your Honor.
6 Thank you.

7 - - -

8 (10:39 a.m.)

9 **CROSS-EXAMINATION**

10 **BY MR. FINK:**

11 **Q.** Good morning, Mr. McMurtrie, Officer McMurtrie. Good
12 morning.

13 **A.** Good morning.

14 **Q.** It's true, is it not, Officer McMurtrie, that your
15 philosophy, your words, as a corrections officer is that
16 prisoners get, prisoners get what they have coming to them?

17 **A.** Yes.

18 **Q.** That's your philosophy?

19 **A.** Yes.

20 **Q.** They get what they have coming to them good or bad is what
21 you said, right?

22 **A.** Absolutely that's what I said.

23 **Q.** That's the lens from which you operate as a corrections
24 officer?

25 **A.** Yes.

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1 Q. Prisoners get what they have coming to them?

2 A. Yes. If a prisoner comes to me --

3 Q. I understand. You also, Officer McMurtrie, and correct me
4 if I'm wrong, you also said on direct examination and prior
5 testimony that you don't always write tickets, correct?

6 A. No, we don't always have to write tickets.

7 Q. You will consider certain situations or make a judgment
8 call?

9 A. Progressive discipline.

10 Q. Does that involve asking questions and seeing what the
11 problems are and considering the circumstances?

12 A. Yes.

13 Q. I believe you told me once maybe somebody's mother died so
14 you'll check and see if that guy's all right. Is that true?

15 A. Yes.

16 Q. In fact, you said nine and-a-half times out of ten you
17 won't write the ticket, you will talk to them and there will be
18 no ticket; is that correct?

19 A. I would rather not write tickets.

20 Q. So you have wide discretion in ticket writing?

21 A. I wouldn't call it discretion. It's progressive
22 discipline, and you have to take in the totality of the
23 circumstances.

24 Q. Well, the rules require you to write tickets when you see
25 a rule violation; isn't that true?

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1 A. No, not all rule violations.

2 Q. The work department rules don't say that you have to write
3 a ticket any time that you see a rule violation?

4 A. The only tickets we are absolutely required to write are
5 Class 1 tickets, nonbondables, serious tickets.

6 Q. So indeed you do have discretion in when to write tickets
7 was my original question.

8 A. Okay.

9 Q. Yes?

10 A. Sure.

11 Q. So that leads to naturally an arbitrary application of the
12 rules, does it not?

13 A. I wouldn't say that.

14 Q. You didn't say that at your deposition?

15 A. I wouldn't say it's arbitrary.

16 Q. Are you sure, you didn't say that at your deposition?

17 A. I don't recall.

18 Q. Would it surprise you that you said it leads to arbitrary
19 results?

20 A. Okay.

21 Q. Are you familiar with the department work rules, Officer
22 McMurtrie?

23 A. I couldn't recite them, but ...

24 Q. Do you get a book of the department rules?

25 A. Yes.

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1 Q. And you've seen them before?

2 A. Yes.

3 Q. You are familiar with them?

4 A. Yes.

5 Q. Could you do me a favor, Officer McMurtrie. The bigger
6 binder there, the obnoxiously large binder, Exhibit 3, if you
7 could flip to that for me. Let me know when you're there.

8 A. I'm there.

9 Q. Do you recognize this document?

10 A. Yes. It's out of the little handbook they give us.

11 Q. The department work rules that you're -- I'm having
12 problems, too.

13 A. Yes.

14 Q. The department work rules that you are given by the
15 department?

16 A. Yes.

17 Q. If you go to Page 15 of the rule book, tell me when you're
18 there.

19 A. It's the first page.

20 Q. Okay. Do you see a section that says, "Employees are
21 prohibited from treating other employees, offenders, visitors
22 and volunteers in an inhumane manner. Employee actions must be
23 taken on a rational, objective and nonarbitrary basis."

24 Do you see that?

25 A. Yes.

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1 Q. Is that your understanding of the rule?

2 A. Yes.

3 Q. Do you follow that rule?

4 A. Yes.

5 Q. Also on Page 15 there's a section that says, "Using
6 speech, action, gesture or movement that causes physical or
7 mental intimidation or humiliation is improper."

8 Do you see that section?

9 A. Yes.

10 Q. Are you familiar with that rule?

11 A. Yes.

12 Q. If you go for me to Page 29.

13 If you go to Page 29, Section 33, Officer McMurtrie, and
14 let me know when you're there.

15 A. Okay.

16 Q. Tell me if I'm reading Section 33 of your rule book
17 correctly. "An employee shall immediately report behavior of
18 offenders or employees who are in violation of department
19 rules, policies or procedures to supervisory staff. Failure to
20 report conduct involving drugs, escape, sexual misconduct,
21 harassment or excessive use of force will aggregate the penalty
22 up to and including dismissal."

23 Did I read that section correctly?

24 A. Yes.

25 Q. Are you familiar with this rule?

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1 A. Yes.

2 Q. And finally on Page 30, Officer McMurtrie, Section 38,
3 please tell me if I'm reading this section correctly.
4 "Employees shall submit accurate and complete oral or written
5 reports when required by department policy or procedure or when
6 requested by a supervisor or authorized personnel. Failure to
7 provide reports that are accurate and complete as required by
8 policy is a violation of this work rule."

9 Did I read that correctly?

10 A. Yes.

11 Q. Do you understand that rule?

12 A. Yes.

13 Q. You can set aside that book for a moment.

14 You testified that you know Defendant Downard, correct?

15 A. Yes.

16 Q. You shared a shift with him in 2011?

17 A. Yes.

18 Q. Interacted with him every day?

19 A. Yes.

20 Q. Did you get along with Defendant Downard?

21 A. Yes.

22 Q. He was your partner for some time, correct?

23 A. Yes.

24 Q. In fact, you called him a close work friend, right?

25 A. Yeah, a close work friend.

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1 Q. And, like you testified, you went to his house so he could
2 fix your muffler; is that correct?

3 A. Yes.

4 Q. Did he fix it?

5 A. Yes.

6 Q. Did he do a good job?

7 A. It lasted about a year.

8 Q. Did you trust Defendant Downard to have your back in
9 prison situations when it called for it?

10 A. Define "have your back."

11 Q. I imagine in a prison environment there could be dangerous
12 situations, correct?

13 A. Yeah.

14 Q. Yeah. Did you trust Defendant Downard to have your back
15 in those situations?

16 A. Yeah.

17 Q. You know Defendant Louis Condon as well?

18 A. Yes.

19 Q. In 2011 he was RUM of Housing Unit 2, correct?

20 A. Yes.

21 Q. You interacted with him every day?

22 A. I couldn't say every day because he had another housing
23 unit, but every week we interacted.

24 Q. I believe you said most days, correct?

25 A. Most days, okay.

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1 Q. You testified just a moment ago that under the work rules
2 you are required to report any violations committed by an
3 employee of the Michigan Department of Corrections; is that
4 correct?

5 A. Yes.

6 Q. Have you ever observed Defendant Downard committing a rule
7 violation of any kind?

8 A. No.

9 Q. Have you ever observed Defendant Condon committing a rule
10 violation of any kind?

11 A. No.

12 Q. How long have you been a corrections officer again?

13 A. About 15 years.

14 Q. Isn't it true, Officer McMurtrie, that in 15 years as a
15 Michigan Department of Corrections officer that you have never
16 written a complaint against another employee?

17 A. No, that's not true.

18 Q. It's not?

19 MR. SCHNEIDER: Your Honor, I'm going to object to
20 lack of relevance to this line of questioning.

21 THE COURT: I'm not sure what your objection is.

22 MR. SCHNEIDER: Relevance, lack of relevance.

23 THE COURT: I'll accept it as relevant at least up to
24 this point. Overruled.

25

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1 **BY MR. FINK:**

2 **Q.** So it's your contention this morning -- thank you,
3 Your Honor. It's your contention this morning that you have
4 written a complaint against another employee for violating a
5 policy?

6 **A.** Once.

7 **Q.** You wrote a complaint?

8 **A.** Yes.

9 **Q.** Are you sure?

10 **A.** Yes.

11 **Q.** In those 15 years -- let's rephrase this. In those
12 15 years as a Michigan Department of Corrections officer you
13 have never written a complaint against another employee for
14 abuse of conduct towards a prisoner; is that correct?

15 **A.** That's correct.

16 **Q.** In fact, it's your position that in 15 years at the
17 Michigan Department of Corrections you have never seen a
18 corrections officer abuse an inmate in any way; is that
19 correct?

20 **A.** No.

21 **Q.** Fifteen years with the Michigan Department of Corrections,
22 you have never seen a guard insult a prisoner, degrade a
23 prisoner, treat him inhumanely, nothing?

24 **A.** Not in front of me.

25 **Q.** You testified at a deposition, Officer McMurtrie, correct

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1 me if I'm wrong, that you write anywhere between 5 and 25

2 misconduct tickets a week, correct?

3 A. I did back then when I was in 2 block.

4 Q. Okay. So that's anywhere from -- my math is not good --

5 300 to 1300 tickets a year?

6 A. It could have been.

7 Q. And in 15 years one ticket or one complaint against

8 another guard?

9 A. Yes. I have answered questionnaires from the inspectors
10 about investigations about other people, but I only initiated
11 one.

12 Q. You have never seen a guard call an inmate a derogatory
13 term?

14 A. No.

15 Q. In terms of the housing unit, Officer McMurtrie, just for
16 my clarification, the officers' desk on base faces the RUM's
17 office; is that true?

18 A. Yes, but there's a giant post -- there's a giant
19 three-foot by three-foot concrete post directly in front of his
20 door so we really -- it depends. If you are sitting in the
21 middle of the desk, you are not going to be able to see
22 anything. If you are at the end of the desk, you will be able
23 to see around the post.

24 Q. Can you see the ARUS offices from the officers' desk?

25 A. Yes.

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1 Q. Can you see the dayrooms behind you?

2 A. They are behind us.

3 Q. But if you turned you could see them?

4 A. Yes.

5 Q. Inside of them?

6 A. Yes.

7 Q. Also, in terms of logistics, Officer McMurtrie, you
8 testified at your deposition, again, correct me if I'm wrong,
9 it could take up to 20 minutes for a prisoner to walk from the
10 chapel back to Housing Unit 2; isn't that true?

11 A. The timeline could vary because --

12 Q. Did you or did you not say it could take up to 20 minutes?

13 A. That's what I said.

14 Q. Okay. You said it's about 300 yards of a walk without
15 gates; isn't that true?

16 A. Well, it has gates.

17 Q. 300 yards if you were just walking without gates; that's
18 how long you estimated the walk would be, about 300 yards,
19 correct?

20 A. Thereabouts, yeah.

21 Q. But there are two gates, right, on that walk?

22 A. Yes, two.

23 Q. And a prisoner can't open the gate himself, correct?

24 A. No.

25 Q. He would have to wait for staff to open the gates for him?

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1 **A.** Yes.

2 **Q.** So if staff was on some other duty or there was no staff
3 at that gate at the moment, a prisoner could potentially be
4 waiting a few minutes for the gate to be opened, correct?

5 **A.** Yes.

6 **Q.** So in addition to walking 300 yards from the chapel, which
7 you said could take up to 15 minutes or 20 minutes, you also
8 have to wait on the guards to open the gates for you, correct?

9 **A.** Sure.

10 **Q.** Okay. And you are aware of the rule, Officer McMurtrie,
11 that if you are at the warden's forum you have an excused
12 absence from work?

13 **A.** Yes.

14 **Q.** You always inquire, right, as to why someone doesn't show
15 up to work, you don't just write a ticket?

16 **A.** Yes.

17 **Q.** Always?

18 **A.** Yes.

19 **Q.** Without fail?

20 **A.** Yes.

21 **Q.** You categorically ask why someone wasn't at work?

22 **A.** Yes.

23 **Q.** You asked Mr. Griffin why he wasn't at work?

24 **A.** Yes.

25 **THE COURT:** Question.

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1 **MR. FINK:** Yes, Your Honor.

2 **BY MR. FINK:**

3 **Q.** Officer McMurtrie, could you flip to Page 88 of your
4 deposition. That was Exhibit -- I'll check myself again.
5 Exhibit -- well, now I'm blanking on the exhibit.

6 **MR. FINK:** May I approach, Your Honor, to see the
7 table of contents on the exhibit book?

8 **THE COURT:** You may.

9 **THE WITNESS:** You said Page 88?

10 **BY MR. FINK:**

11 **Q.** Yes. Exhibit 24, Officer McMurtrie, and Page 88 of the
12 deposition. The page numbers are in the top right corner. Let
13 me know when you are there.

14 **A.** All right.

15 **Q.** If you go down to Line 13 of the deposition, I'm going to
16 read this to you and you tell me if this is incorrect. Were
17 you asked:

18 "Earlier you said, correct me if I'm wrong, but you said
19 Class 2 and Class 3 tickets you take into account the
20 circumstances and you find out exactly what was going on.
21 Maybe Randle Griffin's mother passed away. You didn't ask, did
22 you?

23 You said, "No."

24 I said, "How come you didn't ask Randle Giffin?"

25 "I wouldn't ask anybody. I would just be aware that

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1 something like that happened."

2 Was that accurate testimony?

3 A. Yes.

4 Q. Were you telling the truth at that deposition?

5 A. Yes.

6 Q. So are you lying here this morning or were you lying at
7 the deposition that you categorically always ask where somebody
8 was when they miss work?

9 A. I did ask him where he was when he missed work.

10 Q. I'm asking were you telling the truth at the deposition
11 that you didn't ask him or are you telling the truth this
12 morning that you always ask where somebody was when they are
13 not at work? You said you did not ask Randle Griffin, as you
14 just testified to.

15 A. Okay. In my deposition I said no.

16 Q. So this was the truth at the deposition, but this morning
17 was inaccurate?

18 A. Yes.

19 THE COURT: That is a statement or two statements
20 that are in conflict. Both can be true. I just don't want to
21 confuse the record of the witness. If I understood what he
22 said and the questions you asked, they are not necessarily in
23 conflict.

24 MR. FINK: Thank you.

25 THE COURT: I may be wrong, but that's what I heard.

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1 **MR. FINK:** Thank you, Your Honor. The purpose is
2 that he always asks where a prisoner was when he was out of
3 work and in this case he said he did not ask Randle Griffin why
4 he wasn't at work. I think that is a conflict in the way he
5 operates, but I appreciate Your Honor's comments. Thank you.

6 **BY MR. FINK:**

7 **Q.** You did indeed, Officer McMurtrie, write a ticket against
8 Randle Griffin on March 3rd, 2011. You testified to that?

9 **A.** Yes.

10 **Q.** For being out of place?

11 **A.** Yes.

12 **Q.** Which means that you're not at your assignment on time?

13 **A.** Yes.

14 **Q.** Or otherwise unknown as to your location?

15 **A.** Yes.

16 **Q.** Your position, is it not, this morning is that you asked
17 Mr. Griffin where he was, which you said you didn't do in your
18 deposition, but you said this morning that you asked him where
19 he was and he just stood there in silence?

20 **A.** Yes.

21 **Q.** You also said that you had no reason to have any problem
22 with Mr. Griffin this morning, correct?

23 **A.** No.

24 **Q.** Is that accurate, you didn't have any problems with
25 Mr. Griffin?

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1 A. No.

2 Q. That's not accurate?

3 A. It is accurate.

4 Q. You at that point had no problems with Mr. Griffin?

5 A. No.

6 Q. So you didn't testify at your deposition that he was a
7 troublemaker and that you were watching him and that he had all
8 kinds of tickets and he was a problem for the guards and he was
9 an organizer? You didn't testify to any of that?

10 A. I don't believe I ever said he had a bunch of tickets.
11 The only ticket I ever wrote him got --

12 Q. Did you testify that he was a problem at your deposition?

13 A. I testified that we were watching him as being an
14 organizer type prisoner.

15 Q. Did you testify he was a problem?

16 A. I don't remember. I don't remember.

17 Q. Well, which is the truth? Was he a problem or did you
18 have no problem with him? This morning you said you had no
19 problem with him. At your deposition you called him a problem.
20 So I'm just trying to figure out which story is accurate.

21 A. I didn't have any special problem with him, but I was
22 watching him. I was keeping an eye on him.

23 Q. You had a problem with him, but you didn't have a problem.

24 It's your position that Mr. Griffin, who you called a
25 problem, an organizer, a grievance writer, when confronted with

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1 the ticket you wrote on March 3rd, he just stood there and said
2 nothing. That's your position?

3 A. Yes.

4 Q. You expect the jury to believe that Mr. Griffin, who
5 writes all of these grievances, as Mr. Schneider has pointed
6 out, didn't tell you that he had received a ticket the prior
7 day for the same thing; that's your position?

8 A. He didn't say a word.

9 Q. You are aware of what happens to inmates when you write a
10 misconduct ticket, correct?

11 A. Yes.

12 Q. Loss of privileges, is that one of the sanctions?

13 A. Yes.

14 Q. Being laid in is another sanction perhaps, yes?

15 A. No, being laid in would not be a sanction.

16 Q. That would not be a result of a misconduct ticket?

17 A. Yeah, it would be pending the -- it would be a result
18 pending the outcome, the disposition of the ticket.

19 Q. Indeed, what happens to you when you receive a misconduct
20 ticket, especially out of place from work, is you are laid into
21 your cell for the time period you would have had work, correct?

22 A. Yes.

23 Q. Okay. You also are aware they can lose their job or as a
24 matter of course they do lose their job if found guilty,
25 correct?

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1 A. Yes, it's policy.

2 Q. It can also have an adverse effect on their parole; you
3 are aware of that, right?

4 A. I have nothing to do with paroles.

5 Q. Are you aware that writing a misconduct ticket has an
6 adverse effect on a prisoner's ability to get parole?

7 A. Some of them do.

8 Q. So you are aware of that? Is the answer yes?

9 A. Sure.

10 Q. For a period of time in Housing Unit 2, Officer McMurtrie,
11 for an extended period of time there was just Downard, you,
12 Condon and another officer, right, four officers on the
13 second shift?

14 A. Condon wasn't an officer. He was an ARUS. Actually he
15 was the RUM.

16 Q. How about I rephrase that. As far as personnel in Housing
17 Unit 2, for a period of time it was the three of you plus
18 another officer, correct?

19 A. Three officers, two ARUSs and a RUM.

20 Q. Okay. But the three of you were on a shift together for a
21 period of time; is that accurate?

22 A. Yeah.

23 Q. You testified at your deposition about the March 3rd
24 ticket that you walked Randle Griffin down to ticket review,
25 correct? Did you go with Randle Griffin to Sergeant Howard?

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1 A. No.

2 THE COURT: Question.

3 MR. FINK: Yes, Your Honor. I'm just finding the
4 page here of the deposition.

5 BY MR. FINK:

6 Q. How did it, did it occur then, Officer McMurtrie, that you
7 told Sergeant Howard to rip up the ticket. Was that a
8 telephone call?

9 A. Yes. Like I stated earlier, he went up on a hand pass to
10 the control center so Sergeant Howard could review his ticket.
11 I don't know what he said to her up there. I'm guessing he
12 said Downard --

13 Q. So you did receive a phone call?

14 A. I got a phone call from Sergeant Howard. She explained
15 that Downard had just written the same -- I wrote a duplicate
16 ticket. And I said, "Fine, dismiss mine." Well, then
17 subsequently he came back to the unit and a few minutes later
18 Sergeant Howard came back to the unit --

19 Q. I just want to be clear. You weren't standing with
20 Griffin at ticket review; you were separate?

21 A. Yes.

22 Q. So you were in like the housing unit; he might have been
23 at the control center?

24 A. Yes.

25 Q. Is that what your testimony is?

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1 A. Yes.

2 Q. Okay. Could you flip to Page 86 of your deposition, which
3 is Exhibit 24.

4 A. Okay.

5 Q. If you go to 86, Line 18, did I ask you the question: "In
6 other words, it was as if a ticket never existed?"

7 And then your answer is: "Sergeant Howard came in the
8 next day, which would have been the 4th, to review my ticket.
9 She looked at it. She said Downard just wrote one of these. I
10 didn't know. I said, 'okay, fine, rip mine up.' Griffin is
11 standing right there. She ripped my ticket up, threw it away.
12 The end."

13 Was that accurate when you testified to it?

14 A. Yes.

15 Q. So Griffin was right there with you?

16 A. Yes. When she came out to the unit, Griffin was standing
17 right in front of the desk.

18 Q. Okay. So when you told her to rip it up, it wasn't over
19 the phone, it was in person?

20 A. It was both.

21 Q. You told her twice to rip it up?

22 A. I think when she called me from the control center I told
23 her to dismiss it. I said, "Fine, dismiss it. I didn't know
24 it was a duplicate ticket."

25 Q. So it was your testimony that Randle Griffin was present

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1 for one of these conversations with Sergeant Howard?

2 A. Well, he wouldn't have been present for the conversation
3 between her and me on the phone.

4 Q. Well, he was standing right there in your prior testimony
5 so I'm just trying to confirm what the story was.

6 A. In the control center when she called me on the phone he
7 wouldn't have been present for that. She subsequently came out
8 to 2 block.

9 Q. So there was a second interaction with Sergeant Howard
10 that you didn't discuss this morning, correct?

11 A. I discussed it right here in my ...

12 Q. I'm just asking you, there was more than one interaction
13 with Sergeant Howard?

14 A. Yeah, and I have already stated it today.

15 Q. Okay. Two more things, Officer McMurtrie. Could you turn
16 to Exhibit 20, and let me know when you get there.

17 A. I'm there.

18 Q. Do you recognize this document?

19 A. I recognize it from the, from the deposition. I have
20 never seen one before that.

21 Q. What is it?

22 A. I think it's some kind of time tabulation sheet.

23 Q. Does it have a punch in and punch out for certain days?

24 A. Yes.

25 Q. Do you have any reason to believe that's not your time

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1 card?

2 **A.** No.

3 **MR. FINK:** Your Honor, I ask that Exhibit 20 be
4 admitted into evidence.

5 **MR. SCHNEIDER:** No objection.

6 **THE COURT:** It's received as --

7 **MR. FINK:** Plaintiff's Exhibit 20.

8 **THE COURT:** -- as Exhibit 20 for the plaintiff.

9 **MR. FINK:** Thank you, Your Honor.

10 **BY MR. FINK:**

11 **Q.** If you -- on March 2nd, 2011 -- I understand on the left
12 side of the page they are a little faded, and I see that you
13 filled them in. If you look for 3-2-11, and tell me when you
14 are there.

15 **A.** I don't know what you mean by the "filled in." I don't
16 have the month dates in here.

17 **Q.** On the left side of the paper you don't see March 2nd,
18 2011?

19 **A.** No, there's no month. It didn't copy.

20 **MR. FINK:** May I approach the witness, Your Honor?

21 **THE COURT:** Excuse me?

22 **MR. FINK:** May I approach the witness to --

23 **THE COURT:** Yes.

24 **MR. SCHNEIDER:** I'll just stipulate to whatever he
25 wants to say it says. That's fine. Go ahead, tell him what it

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1 says.

2 **THE COURT:** You apparently can assert something --

3 **MR. FINK:** Easy enough.

4 **THE COURT:** Mr. Schneider is --

5 **BY MR. FINK:**

6 **Q.** Officer McMurtrie, do you have any reason to believe that
7 this exhibit -- on March 2, 2011 that you left the facility,
8 you checked out of work at 10:01 p.m.?

9 **A.** It's right here.

10 **Q.** Okay. Do you have any reason to believe that that's not
11 true?

12 **A.** No.

13 **Q.** Do you have any reason to believe that the time sheet, if
14 it indicated that Officer Downard also left at 10:01 p.m.,
15 would you have any reason to believe that wasn't true?

16 **A.** No.

17 **Q.** So you guys walked out together on March 2nd, 2011 at the
18 exact same minute, correct?

19 **A.** Sure.

20 **Q.** In fact, we came to learn this at the deposition, that
21 that was a little less than 30 minutes after Officer Downard
22 wrote the ticket against Griffin; isn't that true?

23 **A.** Sure.

24 **Q.** My final question is, Officer McMurtrie, you agree with
25 me, do you not, that when a prisoner loses their job, gets laid

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1 in, that cuts away at their dignity as a human being?

2 **A.** Sure.

3 **MR. FINK:** Thanks. Nothing further at this time,
4 Your Honor.

5 **THE COURT:** Mr. Schneider, do you have something?

6 **MR. SCHNEIDER:** Yes, Your Honor. Brief redirect.

7 - - -

8 (11:05 a.m.)

9 **REDIRECT EXAMINATION**

10 **BY MR. SCHNEIDER:**

11 **Q.** What time was your shift in the prison, Officer McMurtrie?

12 **A.** Repeat.

13 **Q.** What time was your shift in the prison, the hours?

14 **A.** 1400 to 2200, 2:00 to 10:00.

15 **Q.** Two o'clock p.m. to ten o'clock p.m.?

16 **A.** Yes.

17 **Q.** What time was ARUS Condon's shift?

18 **A.** I'm not sure exactly what time in the morning he starts,
19 but he ends at 4:00 more or less.

20 **Q.** Between two and three hours after you get there he leaves?

21 **A.** Yes.

22 **Q.** Did you have the same regular days off as Officer Downard?

23 **A.** No. We had rotating days off back then.

24 **Q.** Do you still have that deposition transcript in front of
25 you?

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1 **MR. SCHNEIDER:** Or, you know what, Your Honor, may I
2 approach the witness?

3 **THE COURT:** You may.

4 **BY MR. SCHNEIDER:**

5 **Q.** Okay. You were directed to Page 88 on cross-exam. Would
6 you please turn back to Page 88, please.

7 **A.** I've got it.

8 **Q.** Okay. Starting at Line 17, the question you were asked:
9 "Maybe Randle Griffin's mother passed away. You didn't ask,
10 did you?"

11 Your answer: "No."

12 Correct?

13 **A.** Correct.

14 **Q.** The next question: "How come you didn't ask with
15 Randle Griffin?"

16 **A.** I wouldn't ask anybody. I would just be aware that
17 something like that had happened."

18 **Q.** But you did consider the possibility that he could
19 have been somewhere that he was supposed to be and you didn't
20 even inquire?

21 **A.** He was in his cell. When I called him out, I saw him
22 walk out of his cell."

23 That was your testimony at the deposition, correct?

24 **A.** Yes.

25 **Q.** Okay. There's nothing inconsistent between that and what

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1 you have said today, correct?

2 **A.** No, correct.

3 **MR. SCHNEIDER:** Thank you. No further questions.

4 **THE COURT:** Do you have something further?

5 **MR. FINK:** All set, Your Honor. Thank you.

6 **THE COURT:** Thank you.

7 And, Officer McMurtrie, you are excused. You can go back
8 to counsel table. Thank you.

9 **MR. SCHNEIDER:** Your Honor, the defense would call
10 Officer Downard.

11 **THE COURT:** I think we'll probably let him take the
12 witness chair, but I -- you have two more witnesses scheduled.

13 **MR. SCHNEIDER:** Correct, Your Honor. The other
14 two defendants and then we'll be done.

15 **THE COURT:** I wonder, is this a good, from
16 everybody's point of view, a good time to continue rather than
17 break?

18 **MR. FINK:** The plaintiff will accept whatever the
19 jury and Your Honor's preference is.

20 **MR. SCHNEIDER:** Your Honor, I would suggest, that
21 took half an hour for Officer McMurtrie, if the other
22 two officers go that quick, we will be done with the proofs by
23 noon. So I don't know if you're asking for a break for the day
24 or just a temporary break.

25 **THE COURT:** Well, I don't know either, but probably

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1 nothing like a temporary break, break for the day.

2 Everybody in the jury box, I think you have considered
3 this before and not necessarily had an absolute opinion. If
4 I'm wrong about that, you will tell Mr. Barkholtz, who keeps
5 track of this. Right now I think we go ahead if we're ready to
6 put the next witness on.

7 **MR. SCHNEIDER:** Thank you, Your Honor. In that case
8 the defendant will call -- the defense will call Defendant
9 Downard.

10 **THE COURT:** And, Officer Downard, come up and take
11 the oath, please.

12 - - -

13 **JOSEPH DOWNARD,**

14 being first duly sworn to tell the truth,
15 was examined and testified upon his oath
16 as follows:

17 - - -

18 (11:09 a.m.)

19 **DIRECT EXAMINATION**

20 **BY MR. SCHNEIDER:**

21 **Q.** Good morning.

22 **A.** Good morning.

23 **Q.** Would you tell us your name for the record, please.

24 **A.** Joseph Downard.

25 **Q.** Where are you currently employed, Mr. Downard?

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- 1 **A.** Gus Harrison Correctional Facility.
- 2 **Q.** And your position there?
- 3 **A.** Corrections officer.
- 4 **Q.** Okay. You heard the testimony about the academy before?
- 5 **A.** Yes.
- 6 **Q.** You did that as well when you started?
- 7 **A.** Yes, sir.
- 8 **Q.** You have had annual training?
- 9 **A.** Yep.
- 10 **Q.** You also know the other defendants, I take it?
- 11 **A.** Yes, sir.
- 12 **Q.** Did you meet them at the facility or did you meet them --
- 13 did you know them before?
- 14 **A.** I met them at the facility.
- 15 **Q.** When did you meet Officer McMurtrie?
- 16 **A.** When I started work on 2 block.
- 17 **Q.** Do you remember which year that was?
- 18 **A.** No, I don't.
- 19 **Q.** Do you still work with Officer McMurtrie?
- 20 **A.** No.
- 21 **Q.** How long did you work with him on 2 block?
- 22 **A.** It might have been three or four years.
- 23 **Q.** All right. You heard Officer McMurtrie's testimony as to
- 24 the duties of a corrections officer?
- 25 **A.** Yes.

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1 Q. Do you have anything to add to that?

2 A. No.

3 Q. All right. How many prisoners were in Housing Unit 2?

4 A. I think 240, I believe.

5 Q. And how many officers would be working at once?

6 A. Three.

7 Q. How many shifts per day?

8 A. Three.

9 Q. So you would work one eight-hour shift?

10 A. Correct.

11 Q. You've heard in court this allegation that ARUS Condon
12 assaulted prisoner Bryant. Did you know of that allegation
13 before this lawsuit?

14 A. No.

15 Q. You never heard about that in the prison?

16 A. No.

17 Q. Do you know what an ombudsman is aside from what you've
18 heard here in court?

19 A. Then I didn't. Now I do.

20 Q. Okay. Back in 2011 did you know what an ombudsman was?

21 A. No.

22 Q. Did you know what they do?

23 A. It's in between the State of Michigan and prisoners.
24 That's about all I know about it.

25 Q. Had you ever met Ms. Zimbelman before who was here in

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1 court?

2 A. No.

3 Q. You didn't recognize her?

4 A. No.

5 Q. On March 2nd, 2011 did you have a conversation with the
6 other defendants agreeing to write false tickets?

7 A. No.

8 Q. It never happened?

9 A. No.

10 Q. Have you ever written false tickets against a prisoner?

11 A. No.

12 Q. Ever agreed to do that?

13 A. No.

14 Q. You did write Mr. Griffin a ticket on March 2nd, 2011,
15 correct?

16 A. If that's what ...

17 Q. I'm sorry?

18 A. If that's what the ticket says, yeah.

19 Q. Okay. Do you have the exhibit book in front of you there,
20 the small one. Would you turn to Exhibit E, please.

21 A. Okay. Yes, then I wrote a ticket on Mr. Griffin.

22 Q. This is a copy of a ticket that you wrote, correct?

23 A. Yes.

24 Q. This is your signature here?

25 A. Yes.

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1 Q. In the middle of the page?

2 A. Yes.

3 Q. Okay. Why did you write him this ticket on March 3rd?

4 I'm sorry, on March 2nd.

5 A. Because he didn't come to work nor check in for his
6 detail.

7 Q. Okay. Did you see him go to work at all that day?

8 A. No. I must not have because that's what the ticket says.

9 Q. What time was the violation listed as by you on this
10 ticket?

11 A. 2:30.

12 Q. Okay. And that's up here in the left-hand corner where it
13 says -- can you read that for us?

14 A. It's 1430.

15 Q. Okay. That's military time?

16 A. Yep.

17 Q. And that's 2:30 in the afternoon?

18 A. Correct.

19 Q. And then down here it says, "Date and time written." What
20 time was the ticket written?

21 A. 2131.

22 Q. Okay. Why, if the ticket occurred at 1430, did you wait
23 until 2130 to write it?

24 A. Two reasons. One, because we could have had something
25 going on the whole day, and the second reason is because

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1 sergeants have directed us to write them that way so they have
2 24 hours to review them so they don't have to come out at the
3 beginning of their shift in case something is happening to
4 review it.

5 Q. So this is like that ticket review we heard with Sergeant
6 Howard, correct? That's the process you're talking about?

7 A. Right.

8 Q. And the sergeant has 24 hours after the ticket is written
9 to do the review?

10 A. Correct.

11 Q. Did you ever threaten Mr. Griffin with physical harm?

12 A. No.

13 Q. Did you ever threaten him with tickets?

14 A. No.

15 Q. Did you ever call him a rat?

16 A. No.

17 Q. Did you have any reason to do any of those things?

18 A. No.

19 Q. In the large binder in front of you, could you please turn
20 to Exhibit 6.

21 A. Okay.

22 Q. Okay. That's the grievance that Mr. Griffin wrote against
23 you, correct?

24 A. Okay.

25 Q. Did you ever see that?

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1 A. No.

2 Q. Okay. If you went around threatening prisoners and
3 calling them names, what would the prisoners do about that?

4 A. They would most likely start writing grievances, more
5 grievances, more grievances, and you may even get assaulted.

6 Q. They could assault you?

7 A. Yeah.

8 Q. You are one of three in a housing unite of 240 prisoners,
9 correct?

10 A. Right.

11 MR. SCHNEIDER: No further questions, Your Honor.

12 THE COURT: Thank you.

13 Plaintiff, cross-examination.

14 - - -

15 (11:15 a.m.)

16 CROSS-EXAMINATION

17 BY MS. RUSSELL:

18 Q. Good morning.

19 A. Good morning.

20 Q. Do you and other officers complete work evaluations of
21 prisoners that are employed in the housing unit on a regular
22 basis?

23 A. Yes.

24 Q. Could you please turn to -- well, I'll provide you a
25 binder.

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1 **MS. RUSSELL:** Your Honor, may I approach the witness?

2 **THE COURT:** Yes, you may.

3 **BY MS. RUSSELL:**

4 **Q.** Could you please turn to plaintiff's proposed Exhibit
5 Number 26. Let me know when you are there.

6 **A.** Okay. I'm there.

7 **Q.** Do you recognize this document?

8 **A.** Yes.

9 **Q.** Is this a standard work evaluation form that is used at
10 Gus Harrison?

11 **A.** Yes.

12 **Q.** And is that your signature at the bottom?

13 **A.** Yes.

14 **Q.** This is a work evaluation that you completed on behalf of
15 Mr. Griffin on March 2nd, 2011, isn't it?

16 **A.** Yes.

17 **MS. RUSSELL:** Your Honor, I would like to move to
18 admit plaintiff's proposed Exhibit Number 26 into evidence.

19 **MR. SCHNEIDER:** No objection.

20 **THE COURT:** It's received as Plaintiff's Exhibit 26.

21 **BY MS. RUSSELL:**

22 **Q.** On this form it lists 13 work performance standards that
23 you measure a prisoner employee, correct?

24 **A.** Correct.

25 **Q.** And then next to each standard there are three columns,

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1 one indicating three or more exceptions, one to two exceptions
2 or no exceptions, correct?

3 A. Correct.

4 Q. And an exception is one instance where that employee has
5 not met the performance standard listed, correct?

6 A. Correct.

7 Q. When you completed this work evaluation, it was from the
8 date range of February 26, 2011 to March 2nd, 2011; is that
9 correct?

10 A. Correct.

11 Q. That's a five-day period, correct?

12 A. Right.

13 Q. And when you filled out this evaluation, you indicated
14 that Mr. Griffin should be terminated because of the misconduct
15 ticket he received on March 2nd, 2011, correct?

16 A. Correct.

17 Q. And that's at the bottom?

18 A. Correct.

19 Q. Didn't you indicate on this work evaluation that
20 Mr. Griffin failed to come in on the correct days on three or
21 more occasions in that five-day period?

22 A. Usually we would put all zeros.

23 Q. Just a yes or no answer is fine.

24 A. Yes.

25 Q. And didn't you also indicate that Mr. Griffin had over

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1 30 work performance infractions in that five-day period if you
2 add them up?

3 A. Actually I didn't indicate when I put -- under that when I
4 recommended I didn't check anything.

5 Q. How many did he have?

6 A. I would have to count them.

7 Q. You indicated he had three or more exceptions in 11 of the
8 13 categories; is that correct?

9 A. Yeah, correct.

10 Q. You previously testified that you were aware of Department
11 Work Rule 47, which requires that you do not falsify documents;
12 is that correct?

13 A. Correct.

14 Q. And you comply with this rule when you fill out all forms
15 in the course of your employment, correct?

16 A. Correct.

17 Q. But the information on this form is false, isn't it?

18 A. I shouldn't have put anything there because that's common
19 practice not to put anything when you are terminating a
20 prisoner.

21 Q. So you admit that the information on this form is
22 incorrect because you previously testified that Mr. Griffin
23 only missed one day of work and that one day of work was the
24 one time that led to the misconduct ticket and his termination;
25 is that correct?

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1 **A.** That ticket was for the one --

2 **Q.** Did you testify that Mr. Griffin missed work one day and
3 that one day was the one time that led to him having a
4 misconduct ticket issued?

5 **A.** Correct.

6 **Q.** Did you also testify with respect to his work performance
7 that you had no issues with his poor performance other than the
8 one time that he missed work?

9 **A.** I don't recall that.

10 **Q.** If you could turn to Exhibit 30, and then turn to Page 37,
11 Line 20, and let me know when you are there.

12 Are you there?

13 **A.** Yep, I'm there.

14 **Q.** I asked you, and I quote: "You never had a problem with
15 his performance?

16 Your response: "No. If you don't work though, you get
17 fired."

18 Did I read that correctly?

19 **A.** No, you did not read that correctly.

20 **Q.** Are those the words that are on the page?

21 **A.** Oh, wait. You said Line 20?

22 **Q.** Did I give you the wrong line? I apologize.

23 **A.** Yes, you did.

24 Line 23 is the one you are looking at.

25 **Q.** Well, it starts on Line 20 where I asked you: "What did

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1 you think of his job performance?"

2 And then Line 21, answer: "He was a porter. If we had a
3 problem, we got with someone."

4 Question on Line 23: "So you never had a problem with his
5 work performance?"

6 "A. No. If you don't work though, you get fired."

7 A. Right.

8 Q. Is that correct?

9 A. Correct.

10 Q. Thank you.

11 So you just testified in your deposition that Mr. Griffin
12 only missed work one day and that he otherwise had no issues
13 with his work performance other than missing work one day and
14 yet you filled out an official MDOC form indicating that he
15 missed work on three or more occasions and had over 30 work
16 performance infractions in a five-day period; is that correct?

17 A. Sure.

18 Q. So you would like the jury to believe that you filled
19 out -- did you fill out this form -- strike that.

20 So you violated Work Rule 47 when you completed this work
21 evaluation; is that correct?

22 A. Not that I know of.

23 Q. Didn't you just testify that you were aware that Work
24 Rule 47 requires that you do not falsify documents in the
25 course of your employment?

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1 **A.** Yes.

2 **Q.** Is this -- this document is false, isn't it, because it
3 has incorrect information about Mr. Griffin's work performance?

4 **A.** I don't know anything else about it besides I wrote him
5 that ticket. So there might have been 30 infractions in those
6 five days.

7 **Q.** Then why did you testify that you had no problem with his
8 performance; what is true, the deposition or today?

9 **A.** There could have been other people that told me about the
10 problems.

11 **Q.** So it's your testimony that somebody else perhaps told you
12 about the problems that they were having with him?

13 **A.** Correct.

14 **Q.** And that is potentially the reason why this document is
15 incorrect, correct?

16 **A.** Right.

17 **Q.** When I asked you why you filled out the form in this way
18 in your deposition -- if you could please turn to Page 43,
19 Line 9.

20 **A.** In the deposition?

21 **Q.** Yes.

22 **A.** Okay.

23 **Q.** I asked you, and I quote: "So you have no idea why you
24 would circle the wrong number of exceptions?

25 **A.** No.

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1 "Q. It had nothing to do with the fact that you were
2 dissatisfied with Mr. Griffin in some way, perhaps because you
3 didn't like how he was involved with an investigation of the
4 ombudsman?

5 "A. No. Like I said, I should have just put termination
6 and not filled anything else out."

7 A. Right.

8 Q. So your testimony in your deposition, which was in July of
9 2015, was that you didn't know why you put the incorrect
10 information on the form; is that correct?

11 A. Correct.

12 Q. And today you are providing a different answer?

13 A. I mean I still don't know why I put those on there.

14 Q. You have no idea?

15 A. No.

16 Q. And you are speculating as to whether or not perhaps you
17 had asked around to get more information?

18 A. Correct.

19 Q. You changing your sworn testimony from your deposition has
20 nothing to do with the fact that you knew that you were caught
21 in a lie in your deposition and the jury would be expecting an
22 explanation?

23 A. No.

24 Q. No. I'm going to go next to March 3rd of 2011. You were
25 working that day, weren't you?

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1 **A.** My time sheet showed it.

2 **Q.** Yes. And on a regular workday shift you conduct rounds
3 with the other people on your shift every half an hour; is that
4 correct?

5 **A.** Correct.

6 **Q.** And rounds involves you essentially making sure that all
7 prisoners are accounted for?

8 **A.** Correct.

9 **Q.** And when you do the rounds, you walk up and down the wings
10 to check the cells?

11 **A.** Correct.

12 **Q.** Is it usually you by yourself going down one wing and then
13 another officer going down another wing? Do you walk together?
14 Is it --

15 **A.** We switch it up.

16 **Q.** You switch it up and it varies?

17 **A.** Yes.

18 **Q.** But it is possible if you were doing rounds you might walk
19 down one of the cell block wings?

20 **A.** Correct.

21 **Q.** And it's very likely that you conduct rounds at least once
22 or twice that day, is that correct, or almost every half hour
23 you probably were involved with the rounds?

24 **A.** Yeah.

25 **Q.** And it's possible when you conducted rounds at one point

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1 you could have walked past Mr. Griffin's cell?

2 A. Yeah.

3 Q. And when you walked past Mr. Griffin's cell, he would have
4 been there because he had been laid in from work, is that
5 correct, on the 3rd?

6 A. This is the day after I wrote that misconduct?

7 Q. Yes.

8 A. Yeah, sure.

9 Q. So Mr. Griffin, who was laid in from work after the
10 misconduct ticket you issued on March 2nd, would be in his cell
11 laid in on March 3rd, and when you were conducting rounds, if
12 you did, which I believe your testimony is you don't remember,
13 it's very possible that you could have walked past his cell?

14 A. Yeah.

15 Q. Okay. I want to ask you a couple questions about the
16 cameras in the unit.

17 A. Okay.

18 Q. In your deposition you testified that there is a camera in
19 Housing Unit 2 and it's right in the center of base, correct?

20 A. It's right by the officers' desk.

21 Q. It's right by the officers' desk?

22 A. Yes.

23 Q. It's a 360-degree camera, correct?

24 A. So it doesn't show you 360 degrees. It only showed you
25 one direction.

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1 Q. It only points in one direction, and you don't know what
2 direction it's pointing, do you?

3 A. Correct.

4 Q. So it could be pointed anywhere in that housing unit?

5 A. Correct.

6 Q. And you wouldn't know what the camera footage is
7 collecting?

8 A. Correct.

9 Q. And it may not be directed at one of the rec rooms?

10 A. Correct.

11 Q. It could be directed somewhere else?

12 A. Correct.

13 MS. RUSSELL: No further questions, Your Honor.

14 THE COURT: Mr. Schneider, redirect.

15 - - -

16 (11:27 a.m.)

17 **REDIRECT EXAMINATION**

18 **BY MR. SCHNEIDER:**

19 Q. Okay. On the screen in front of you this is Exhibit 26
20 you were just asked about, correct?

21 A. Correct.

22 Q. Okay. And the title of that says, "Prisoner Program and
23 Work Assignment Evaluation," correct?

24 A. Correct.

25 Q. When a prisoner gets a new job, how long is it before they

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1 get an evaluation?

2 A. I think it's -- I think you've got to do it every
3 six months normally.

4 Q. Okay. And how long had Mr. Griffin had this job?

5 A. Five days.

6 Q. All right. Was this meant as an evaluation form?

7 A. No.

8 Q. What was the purpose of this form?

9 A. To tell the classification director that he received a
10 misconduct for not showing up and for the classification
11 director to refill the position.

12 Q. Okay. And these exceptions that were discussed, that's
13 just all of these zeros that you circled here, right?

14 A. Correct.

15 Q. And you actually did circle 3 on a couple of them?

16 A. Correct.

17 Q. Why did you do that?

18 A. Because he followed most of the rules, and he kept a neat,
19 clean appearance.

20 Q. Did you have any information on any of these other
21 categories?

22 A. I must have. I mean not that I remember because it was
23 2011.

24 Q. Had you warned him previously about being late for work?

25 A. I don't remember. I must have.

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1 Q. All right. Did you write that in your ticket?

2 A. Yes. "Prisoner was warned that he needed to check in and
3 work previously."

4 Q. Just real quick, going back to this evaluation form, is it
5 standard practice to use this form to communicate to the
6 classification director about termination?

7 A. Yes.

8 Q. Who makes that decision, about termination?

9 A. The classification director.

10 Q. You can't decide that yourself?

11 A. I cannot decide that, no.

12 Q. You just make a recommendation?

13 A. Correct.

14 MR. SCHNEIDER: No further questions.

15 THE COURT: Thank you. Any further questions for the
16 plaintiff?

17 MS. RUSSELL: One question hopefully.

18 THE COURT: Okay.

19 - - -

20 (11:29 a.m.)

21 **RECROSS-EXAMINATION**

22 **BY MS. RUSSELL:**

23 Q. Mr. Downard, you testified that you filled out this form
24 because it's how you were directed to fill out the form by your
25 superiors? Is that what you testified?

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1 **A.** No.

2 **Q.** So you just don't know why you filled out the form in this
3 way?

4 **A.** Correct.

5 **MS. RUSSELL:** Okay. Thank you.

6 **THE COURT:** Anything further from you, Mr. Schneider?

7 **MR. SCHNEIDER:** No, Your Honor.

8 **THE COURT:** Officer Downard, you are excused.

9 Thank you. You can go back to counsel table.

10 Right now we have one more witness for the defendants, and
11 we might be able to get that person on and off in a short
12 period of time. And then we would be faced with the question
13 of do we do anything further, and I'm inclined not to do it
14 even though there are probably good arguments to finish up
15 anything that's going on.

16 But we would be faced then with closing arguments for both
17 plaintiff and defendants and my jury instructions. I don't
18 know about closing arguments, which are set for no longer than
19 30 minutes. Usually they make that schedule. Jury
20 instructions will be something like 45 minutes, which seems to
21 me to put the matter over another day.

22 Why don't we go ahead and put your last witness on and try
23 to, try to get through that first.

24 **MR. SCHNEIDER:** Thank you, Your Honor.

25 **THE COURT:** And get the jury sent out on whatever

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1 basis.

2 **MR. SCHNEIDER:** Mr. Fink and myself have discussed
3 this. We want to leave it up to the Court and the jury, let
4 the jury decide if we want to come back tomorrow or next week,
5 okay?

6 **MR. FINK:** Whatever this Court's preference is is the
7 plaintiff's position, judge and jury, as to whether you want to
8 finish tomorrow or Monday.

9 **THE COURT:** Well, I hate to confuse anybody with what
10 goes on, but probably the judge is going to decide.

11 **MR. FINK:** Yes, Your Honor.

12 **THE COURT:** But I would like to keep you happy, too,
13 but I mean that I have structural questions with starting
14 deliberations at the beginning of the day. If we go to closing
15 arguments tomorrow, it's going to be roughly, roughly pretty
16 close to noon before we're done with everything verbal, and I
17 think that all of you are going to think, probably some of you
18 are, that your day ends well before noon.

19 So I'm thinking about that. I haven't heard any arguments
20 coming from the other side, but I haven't heard anything
21 inconsistent with what I just said so let's put Mr. Condon on.

22 **MR. SCHNEIDER:** Yes, Your Honor. The defense calls
23 ARUS Condon.

24 **THE COURT:** And would you come forward and take the
25 oath.

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1

- - -

2

LOUIS CONDON,

3

being first duly sworn to tell the truth,

4

was examined and testified upon his oath

5

as follows:

6

THE COURT: Thank you.

7

- - -

8

(11:33 a.m.)

9

DIRECT EXAMINATION

10

BY MR. SCHNEIDER:

11

Q. Good morning.

12

A. Good morning.

13

Q. State your name for the record, please.

14

A. Louis Condon.

15

Q. Where are you currently employed, Mr. Condon?

16

A. Gus Harrison Correctional Facility.

17

Q. What is your job title there?

18

A. Assistant Resident Unit Supervisor.

19

Q. What was your job title back in 2011?

20

A. It was Acting Resident Unit Manager.

21

Q. You were filling in for somebody else?

22

A. Yes. I have done that on a few occasions when they have

23

been on sick leave for extended periods of times or other

24

leaves of absence.

25

Q. So under the civil service rules you are classified as an

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1 ARUS, correct?

2 A. Correct.

3 Q. You are allowed to serve as an "acting" in other positions
4 sometimes?

5 A. Correct.

6 Q. How long have you been employed by the Michigan Department
7 of Corrections?

8 A. 21 1/2 years.

9 Q. Were you ever a corrections officer?

10 A. Yes.

11 Q. In the prison is it true that you have custody and
12 non-custody staff?

13 A. Correct.

14 Q. Which side of the aisle does the ARUS or RUM fall on?

15 A. That would be the non-custody.

16 Q. So you go to work in plain clothes?

17 A. Correct.

18 Q. You are not uniformed?

19 A. Correct.

20 Q. What were the duties -- what were your duties as acting
21 RUM in 2011?

22 A. That would be overseeing the ARUSs, and it changed during
23 that period of time because at one point in time during that I
24 was overseeing two housing units and then there was an
25 elimination of a RUM's position so I became overseeing

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1 three housing units, overseeing the staff, the ARUSs, within
2 those units, and both myself and custody staff shared
3 supervisory capacity over the officers in those units. We
4 dealt with day-to-day issues, interactions with the prisoners,
5 problems, a lot of case management because there's -- each
6 prisoner has a commitment file. There's a lot of PER
7 preparation, which is parole eligibility. There's a lot of
8 paperwork that's dealt with in those offices.

9 Q. Did you have a lot of contact with the prisoners?

10 A. Yes.

11 Q. Did they come into your office?

12 A. They would come and go all day long.

13 Q. What were the hours that you worked in 2011?

14 A. That would be 8:00 until 4:30.

15 Q. So you had some overlap with Officers Downard and
16 McMurtrie?

17 A. Correct.

18 Q. About three hours, two, three hours?

19 A. 2 1/2 hours, yeah.

20 Q. When is the last time you worked with Officers Downard and
21 McMurtrie?

22 A. That would be mid to late 2011 when I returned to my ARUS
23 duties when the person that was on leave of absence at that
24 time returned to their assignment.

25 Q. All right. Have you, aside from your normal job duties,

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1 have you assumed other duties at the prison as well?

2 **A.** Yes. This last time -- I have been assigned to the --
3 administration has assigned me to acting RUM position on
4 three separate occasions under three different administrations.
5 During the last most recent one I was assigned to be the
6 facility's PREA coordinator, which is the Prison Rape
7 Elimination Act coordinator for the entire facility.

8 **Q.** How much time did you put into those duties?

9 **A.** A lot. As a matter of fact, when I returned to my normal
10 duties of ARUS my wife was extremely ecstatic that I was being
11 removed from it because it meant the other person was coming
12 back to work because to get us in compliance I was putting in
13 anywhere from 16 to 20 hours every week of my own time at home
14 and meetings outside of work that the deputies were aware of.

15 **Q.** Were you paid for that time?

16 **A.** No.

17 **Q.** Have you taught classes in the prison?

18 **A.** Yes. "Thinking for a Change" I have taught for several,
19 several years.

20 **Q.** What's "Thinking for a Change"?

21 **A.** "Thinking for a Change" is a 25-session programming that's
22 done by programming staff and ARUSs included. We go to
23 training for it ahead of time a week or two. I think it was
24 two weeks actually in Jackson.

25 It's 25 sessions of basic, elementary skills that a lot of

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1 people pick up, but it's communications, it's interaction with
2 other people, and the premise behind the whole program is we
3 have built a lot of these skills like problem solving,
4 communication, thinking of others, putting yourself in other
5 people's shoes and thinking where they are at, stress
6 management and problem solving, all of these things.

7 When they are in that program, it's to get them to slow
8 down because a lot of times they make rash decisions and end up
9 in the situation that they are in.

10 Q. I'm going to cut you off. I don't want you to go on too
11 long with this.

12 A. All right.

13 Q. Are you currently required to teach that course?

14 A. I'm required to teach it on occasion, at least one time a
15 year.

16 Q. Okay. And how many times a year do you teach that course?

17 A. My partner and I, ARUS Gibbs, we teach it continuously,
18 full time, all year round, four times a year.

19 Q. Okay. And you do that to help the prisoners?

20 A. Yeah, it's voluntary that we do the extra. We go above
21 and beyond because we are devoted to the class, to give them
22 the skills.

23 Q. I want to ask you about prisoner Bryant. Do you remember
24 him at all?

25 A. Yes.

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1 **Q.** What was going on on this day where you allegedly
2 assaulted prisoner Bryant?

3 **A.** When that allegedly happened I was in my office to begin
4 with. I became aware of it as the situation grew because it
5 happened over about a period of about an hour. He was out on
6 base having troubles with numerous officers.

7 It started out with insolence because he was trying to
8 instruct an officer. He was on sanctions at the time, top
9 watch, from numerous previous misconducts he had from other
10 officers, but he was telling the officers not to keep track of
11 him --

12 **MR. MOODY:** Objection, Your Honor, hearsay.

13 **THE COURT:** What was the witness testifying?

14 **MR. MOODY:** He was testifying as to what Mr. Bryant
15 said.

16 **THE COURT:** And I didn't hear the question, I guess.
17 What --

18 **MR. SCHNEIDER:** The question was just tell us what
19 was going on that day with Mr. Bryant. Whatever he said that
20 Bryant said, it's not being offered for the truth of the
21 matter. He's just testifying about what he saw, what was going
22 on for context about this whole situation, Your Honor.

23 **THE COURT:** On that basis I will let it go ahead and
24 will deny the motion.

25 **MR. SCHNEIDER:** Thank you, Your Honor.

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1 **THE WITNESS:** He had started with telling an officer,
2 I believe it was Officer Mary, a female -- he was on top watch,
3 supposed to be in his cell. He was telling her -- he was
4 cursing at her and telling her not to pay attention to him.

5 **BY MR. SCHNEIDER:**

6 **Q.** Let me see if I can shorten this up.

7 **A.** Yep.

8 **Q.** Counsel will object if he has a problem with this, but
9 over the course of about an hour Mr. Bryant had three
10 misconduct tickets?

11 **A.** Yes, for insolence, for cussing at her, for disobeying a
12 direct order, out of place because he was told by another staff
13 member to return to his cell while he was on sanctions. That
14 was about 20 minutes later, and then again, approximately 20,
15 30 minutes later again, this is when I became involved, he was
16 written a creating a disturbance misconduct.

17 **Q.** By you?

18 **A.** No.

19 **Q.** By one of the officers?

20 **A.** Correct.

21 **Q.** How old is Mr. Bryant, if you know?

22 **A.** Now or then?

23 **Q.** Now.

24 **A.** Late 30s, I would guess.

25 **Q.** You don't know?

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1 **A.** Not exactly.

2 **Q.** Have you reviewed his OTIS sheet?

3 **A.** I have seen it once just for identification. I have seen
4 it for that. I believe, if memory serves me correct, he's 39
5 or something now.

6 **Q.** 39 now?

7 **A.** Correct.

8 **Q.** How old would he have been back in 2011 then?

9 **A.** Six years off, so 33.

10 **Q.** Okay. 33 years old?

11 **A.** Yes.

12 **Q.** Okay. So you got involved in this incident after the
13 third ticket was written?

14 **A.** During the process of what was ongoing for the third
15 ticket.

16 **Q.** Okay. What did you do?

17 **A.** I became aware because there was a lot of noise going on
18 on base and staff were locking up the activity rooms, which it
19 doesn't happen real frequently. I went out there and became
20 aware that he was refusing to go back to his cell. I realized
21 at that time he had had numerous other problems with staff.

22 So he had his duffel bag sitting on the floor near the
23 unit, close to the unit entrance and was demanding that he was
24 going to go -- he was telling staff he was going to go to
25 segregation.

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1 One of the things that needs to occur in a prison facility
2 is accountability of prisoners' property. Whenever a prisoner
3 goes to segregation or something they need to inventory it so
4 that nothing gets lost or stolen. For that sake I ordered him
5 to -- he was holding it by a strap. He was telling staff time
6 and time again he was going to go to segregation, do it his
7 way.

8 Q. Let me stop you. What was he holding?

9 A. He was holding the strap of the duffel bag.

10 Q. Okay. And then what did you tell him?

11 A. I gave him three orders to leave the duffel bag by the
12 wall, to leave it there, to let go of the duffel bag.

13 Q. Okay. Did he eventually comply with that order?

14 A. Yeah.

15 Q. Did you grab his arm at all?

16 A. No.

17 Q. Shake him?

18 A. Nope.

19 Q. Assault him in any way?

20 A. No.

21 Q. Did you snatch the duffel bag out of his hands?

22 A. No.

23 Q. Did Mr. Bryant file a grievance on this against you at the
24 prison?

25 A. He did.

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1 Q. Okay. Were you questioned about that grievance?

2 A. Yes, by Acting Deputy Warden -- or, excuse me, Assistant
3 Deputy Warden DeLeeuw.

4 Q. That's your boss?

5 A. Correct.

6 Q. Where is he in the prison hierarchy? If you have a
7 warden, how far down from that is the assistant?

8 A. You have the warden, the deputy warden, and then the
9 assistant deputy warden.

10 Q. Okay. Does the ADW have access to the video system?

11 A. Yes.

12 Q. Okay. Access to witnesses?

13 A. Yes.

14 Q. And he cleared you on that grievance, correct?

15 A. Correct.

16 Q. How long after this alleged incident was it that you spoke
17 with the assistant deputy warden about this?

18 A. I'm not exactly sure. It would have been ten days to
19 two weeks maybe, somewhere.

20 Q. And this -- do you know the date that this allegedly
21 occurred?

22 A. I believe it was on February 9th.

23 Q. When the assistant deputy warden spoke to you about the
24 grievance, did Mr. Griffin's name ever come up at all?

25 A. No.

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1 Q. Did you ever become aware that Mr. Griffin was claiming he
2 was helping Bryant with this in some manner?

3 A. No.

4 Q. Were you ever aware that Mr. Griffin or Mr. Bryant spoke
5 to the ombudsman about this?

6 A. No.

7 Q. Did you recognize Ms. Zimbelman when she was here?

8 A. No.

9 Q. If an ombudsman did come into the prison, did anybody ever
10 tell you about it?

11 A. No.

12 Q. That report, Exhibit 44, had you ever seen that before?

13 A. Which one was that? Can you --

14 Q. It was the ombudsman's 13-page report.

15 A. No.

16 Q. You had never seen that before?

17 A. No.

18 Q. Did you ever have a conversation with Mr. Griffin about a
19 mail issue related to the warden's forum?

20 A. Yes.

21 Q. When was that?

22 A. That was on February 23rd.

23 Q. How do you know that date?

24 A. I -- when we do the warden's forum minutes for the units,
25 we type up block rep meeting minutes and it's done at that

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1 time. It would have that date on there. It's done in a memo
2 form for the department.

3 Q. Okay. Now, Mr. Griffin says you had a second conversation
4 about that issue on March 2nd. Did that happen?

5 A. No.

6 Q. You never had any second conversation with him about that
7 issue?

8 A. No. It was a resolved issue at that time.

9 Q. Did you ever know he had a meeting with an ombudsman?

10 A. No.

11 Q. Did you ever have a conversation with Officers Downard and
12 McMurtrie about writing false tickets?

13 A. No.

14 Q. How far is it from the laundry room to the officers' desk?

15 A. Roughly 20 feet.

16 Q. Is it loud in the unit?

17 A. Very.

18 Q. Is it even louder if the laundry machines are running?

19 A. Yes.

20 Q. Explain why.

21 A. We, we are under a contract now for laundry machines. At
22 the time we owned our equipment. Now we are getting near the
23 end of a five-year lease so at that time we would have had the
24 old equipment that was -- the facilities opened in '89 and '91
25 so they were 20 years old. They were commercial big equipment,

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1 and they were falling apart. That's why we are under a lease
2 now. And they would rattle and make tremendous amounts of
3 noise in there.

4 **Q.** Okay. Were there certain times of the day that the
5 laundry wasn't allowed to be run?

6 **A.** Yeah, we are under -- with Consumer's Power, the energy
7 company, to conserve energy we were under an agreement with
8 them to save money that we would not operate our laundry room
9 between the hours of 11:00 a.m. and 1700 [sic] hours we
10 wouldn't run our electric dryers.

11 **Q.** So if a prisoner said that he was in the laundry room
12 working between those hours, is that true?

13 **MR. MOODY:** Objection, calls for speculation.

14 **THE COURT:** If you know.

15 **THE WITNESS:** If I know?

16 **THE COURT:** If you have any basis for knowing whether
17 he was or he wasn't.

18 **THE WITNESS:** That would be right outside my office
19 door so I would be very familiar with that.

20 **THE COURT:** You may testify.

21 **THE WITNESS:** They would not be working laundry
22 services. After formal count they would collect prisoners'
23 clothing, clothes to start cleaning after 1900 hours, which is
24 7:00 p.m.

25

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1 **BY MR. SCHNEIDER:**

2 **Q.** Did you have any reason to be upset with Mr. Griffin?

3 **A.** No.

4 **Q.** How long does it take to walk from the chapel to Housing
5 Unit 2?

6 **A.** Myself or prisoners?

7 **Q.** Prisoners.

8 **A.** It depends on any given day. It could be 10, 15,
9 20 minutes with the opening and closing of gates.

10 **Q.** Okay. Did you remove Mr. Griffin from the warden's forum?

11 **A.** No.

12 **Q.** Do you have the authority to do that in the prison?

13 **A.** No.

14 **Q.** Do officers have that authority?

15 **A.** No.

16 **Q.** Do you know who did remove Mr. Griffin from the warden's
17 forum?

18 **A.** Yes. That was the warden.

19 **Q.** Do you know why?

20 **A.** Yes. There was an ongoing investigation that was
21 conducted by Inspector Goldberg and the --

22 **MR. MOODY:** Objection, Your Honor. What Mr. Condon
23 is about to testify to has already been ruled by you as
24 inadmissible. I would request a side bar to discuss it.

25 **THE COURT:** I take it that this witness doesn't have

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1 any at least announced contact with the investigation or what
2 the result was so I believe that you should go on to something
3 else.

4 **MR. SCHNEIDER:** Okay. Your Honor, what I would like
5 to do at this time is make an offer of proof for Defendants'
6 Exhibits C and D, which again explain why he was removed from
7 the forum. You excluded them from evidence yesterday, but I
8 would like to make an offer of proof at this time.

9 **THE COURT:** Yes.

10 **MR. MOODY:** Both of these exhibits were discussed at
11 side bar yesterday, and you previously ruled that both were
12 inadmissible as irrelevant. They still are the same documents
13 they were yesterday. I would request you make the same ruling
14 again.

15 In addition, the defense is attempting to admit these
16 documents through Officer Condon, who cannot authenticate them.
17 He didn't draft the document. He wasn't sent the document. He
18 has no ability to authenticate this document or bring it into
19 evidence.

20 So, in sum, Your Honor, there's no reason to change your
21 ruling from yesterday.

22 And, Judge, I just would ask as well, because we did this
23 at side bar, if there is further discussion, I would ask that
24 it again be done at side bar.

25 **THE COURT:** Mr. Schneider.

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1 **MR. SCHNEIDER:** I'm not sure if you want me to
2 respond or not. There's been a request for a side bar.

3 **THE COURT:** I'm not sure either. If you've got some
4 response, you can make it.

5 **MR. SCHNEIDER:** Yes, Your Honor.

6 The plaintiff has argued that his prior removal from the
7 warden's forum at a different prison was not brought up at his
8 current prison until after these defendants' tickets. These
9 documents show that's just not true, he was already being
10 investigated for certain misconduct.

11 He has accused the defendants of removing him from the
12 forum. These documents show that they did not and that
13 investigation precedes these alleged activities here.

14 **THE COURT:** The same argument that took place before?

15 **MR. MOODY:** That's exactly right, Your Honor, and I
16 would point out that the date of the document is after
17 Mr. Griffin was already removed from the forum. It's the same
18 argument as yesterday.

19 **THE COURT:** Well, I have heard Mr. Schneider's
20 explanation, but I think the ruling is consistent with the
21 Court's ruling yesterday and I will grant the motion.

22 **MR. SCHNEIDER:** Okay. So the exhibits are excluded,
23 correct?

24 **THE COURT:** Excuse me?

25 **MR. SCHNEIDER:** The exhibits are not admitted,

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1 correct?

2 **THE COURT:** Yes.

3 **MR. SCHNEIDER:** Okay. In that case I have no further
4 questions. Thank you.

5 **THE COURT:** Anything further for this witness?

6 **MR. MOODY:** Yes, Your Honor. Thank you.

7 **THE COURT:** I don't know how much you have, but I see
8 that Mr. O'Brien is in the -- at the end of the -- we have got
9 something else on the Court's schedule, which doesn't
10 necessarily control everything, but I do have the pressure of
11 some other things to do here.

12 **MR. MOODY:** I understand, Your Honor. I don't intend
13 to take a long time, but certainly I don't want to
14 underestimate here. I would think 10 to 15 minutes probably.

15 **THE COURT:** I guess perhaps we are going to have
16 Mr. Condon with us anyway whenever we reconvene. Why don't we
17 spend until about noon, 12:00, which isn't very long.

18 **MR. MOODY:** Okay. Your Honor, I'm happy to proceed
19 that way. I'm also happy to -- I know I'll go past noon so
20 it's certainly for the Court's discretion -- I'm happy to pick
21 up later if you prefer that just because I know it'll go more
22 than seven minutes.

23 **THE COURT:** Unless there's some major persuasive
24 objection, I think that makes sense. Thank you.

25 **MR. MOODY:** Okay.

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1 **THE COURT:** Then we're done, that is, for the week.
2 We'll be back Monday. I hope that doesn't disappoint you or
3 ruin your schedules, but we're going to go to you I think,
4 without any question, on Monday, and the matter will be in your
5 hands.

6 We have got maybe another witness or two to deal with,
7 then we've got closing arguments for both sides, and then
8 you've got me you've got to deal with with my instructions to
9 the jury. And that will probably get us to 11:30 or something,
10 and at that point it will be in your hands.

11 The other thing is, and I hope it's true, I think we'll
12 get you lunch if you're deliberating, if you want lunch,
13 otherwise you will come back the next day, something like that.

14 But please, if you can stand to hear this without getting
15 too impatient, you've been wonderfully patient, you shouldn't
16 discuss the case with anyone, including family, neighbors,
17 friends, business associates -- you can sit down -- and fellow
18 jurors at any time during the trial. You must not permit
19 anyone to attempt to discuss it with you or in your presence.
20 If they try to or won't stop, send a note to me. In order to
21 avoid the appearance of impropriety, don't have any
22 conversation with the parties, lawyers or anyone who you may
23 come to recognize as having some connection with the case. The
24 parties are entitled to the appearance, and even though we
25 trust and usually accurately that nobody would attempt to

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1 violate these instructions and discuss with somebody what's
2 going on in the trial, they shouldn't even put the parties to
3 the case in a situation where observing you would make it
4 likely or somebody might conclude that you were doing something
5 that involved the case.

6 No electronic gear, no newspaper articles, no research or
7 television. And, beyond that, I think eight o'clock --
8 nine o'clock on Monday morning. That's right. I guess I was
9 wondering if I had an earlier schedule.

10 But please have a good weekend. Thank you very much for
11 being good jurors and being patient and for being here through
12 this whole thing, and I hope, it's up to you, I hope you make
13 it through this on Monday but pretty soon if it isn't Monday.
14 Please have a good weekend, a safe weekend out there.

15 **THE CLERK:** All rise for the jury.

16 (Jury out at 11:57 a.m.)

17 **THE COURT:** Obviously Mr. Condon is not done yet, and
18 you are going to be here anyway, which was the basis upon which
19 I thought we could conclude this without hurting anybody very
20 much today.

21 And you're not excused. You are still under oath.

22 Does anybody have anything else they want the record to
23 reflect at this point?

24 **MR. SCHNEIDER:** Nothing from the defense, Your Honor.

25 **MR. MOODY:** Nothing from plaintiff.

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1 **MR. SCHNEIDER:** Nothing for the defense.

2 **THE COURT:** Yes, yes, thank you.

3 Thank you for your patience and your cooperation.

4 Thank you for your professionalism. Have a good weekend.

5 We'll see you Monday at 9:00.

6 The Court is in recess.

7 (Proceedings adjourned at 11:59 a.m.)

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10 **C E R T I F I C A T I O N**

11 I certify that the foregoing is a correct transcription of
12 the record of proceedings in the above-entitled matter.

13

14 s/ Sheri K. Ward
15 Sheri K. Ward
 Official Court Reporter

2/6/2017
Date

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